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FEDERAL ELECTION COMMISSION

PROBABLE CAUSE HEARING

MATTER UNDER REVIEW: 6128

Wednesday, May 25, 2011

999 E Street, N.W.  
9th Floor Meeting Room  
Washington, D.C.

JARDIM REPORTING ASSOCIATES  
(703) 867-0396

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**COMMISSION MEMBERS:**

CYNTHIA L. BAUERLY, Chairperson

CAROLINE C. HUNTER, Vice Chairperson

MATTHEW S. PETERSEN, Commissioner

ELLEN L. WEINTRAUB, Commissioner

STEVEN T. WALTHER, Commissioner

**ALSO PRESENT:**

CHRISTOPHER HUGHEY, Acting General Counsel

SHANA BROUSSARD, Office of General Counsel

ALEC PALMER, Acting Staff Director

**WITNESSES:**

STANLEY M. BRAND, ESQ.

ANDREW D. HERMAN, ESQ.

Brand Law Group

923 15th Street, N.W.

Washington, D.C. 20005

(202) 662-9700

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## C O N T E N T S

WITNESSES	PAGE
Andrew D. Herman	5
QUESTIONS	
By Chairperson Bauerly	28
By Commissioner Hunter	40, 47
By Commissioner Petersen	10
By Commissioner Weintraub	23, 36
By Commissioner Walther	43

## P R O C E E D I N G S

(10:04 a.m.)

CHAIRPERSON BAUERLY: We are here for Matter Under Review 6128 representing Mr. Herman and Mr. Brand.

Respondents will have 20 minutes for an opening statement. You may divide the time between an opening statement and a closing statement as you like. You just need to let us know what you want to do at the outset and we will be very flexible, but we will try to keep it to around that.

After an opening statement, the Commissioners will have an opportunity to ask questions following which the General Counsel and Staff Director may ask questions if they have any.

This hearing is, unless there are unusual circumstances, is limited to the issues presented in the briefs that are before the Commission.

So with that short introduction, I will turn it over to Mr. Herman.

STATEMENT BY ANDREW D. HERMAN, ESQ.

MR. HERMAN: Thank you very much. I

1 appreciate the opportunity to address you this.  
2 morning and discuss our case. I would like to  
3 reserve five minutes at the end, although I highly  
4 doubt that I will take all 15 at the outset.

5 The first thing I would like to stress is  
6 there is no factual dispute in this record. I think  
7 we would agree with the assertions made in the  
8 General Counsel's brief about the expenditures made  
9 by Senator Craig. I don't think we would take issue  
10 with any of their characterization of the underlying  
11 facts that gave rise to this matter. Where we  
12 diverge from the General Counsel's analysis is in  
13 their legal analysis and in their application of this  
14 Commission's advisory opinions, particularly Advisory  
15 Opinion 2006-35, which is the Kolbe Advisory Opinion.

16 I would really like to cut straight to the  
17 chase. Plain and simple, Senator Craig's legal  
18 expenses relating to the misdemeanor case in  
19 Minneapolis are ordinary and necessary expenses of an  
20 office-holder pursuant to 2 U.S.C. 439(a)(a). We  
21 reach this conclusion simply by referring to the  
22 2006-35 Kolbe Advisory Opinion and the facts in

1 Senator Craig's matter are essentially identical and  
2 certainly they are not distinguishable in any  
3 material manner from the facts in the Kolbe Advisory  
4 Opinion.

5 In that case, Congressman Kolbe took a  
6 rafting trip to the Grand Canyon. That trip was paid  
7 for with federal dollars. He was accompanied by  
8 members of his family and two former pages and his  
9 request to this Commission stemmed from legal fees he  
10 was required to expend relating to an investigation  
11 in his conduct on that trip, conduct which I don't  
12 think anyone would claim was related, strictly  
13 related to his duties as a federal office-holder.

14 There was a second element to that Advisory  
15 Opinion request which is not particularly relevant to  
16 this matter.

17 The FEC in response to the request from  
18 Congressman Kolbe's treasurer held that all of his  
19 legal expenses relating to the investigation and to  
20 his conduct on that trip were ordinary and necessary  
21 business expenses pursuant to 2 U.S.C. 439(a)(a).

22 In the General Counsel's brief you have

1 before you, their position on this is that that case  
2 is materially distinguishable, but they provide no  
3 explanation for why that is and quite frankly, I am  
4 baffled as to why that is. Just like Congressman  
5 Kolbe, Senator Craig's trip was paid for by the  
6 United States government pursuant to his position as  
7 a United States Senator. He was traveling from his  
8 home state in Idaho back to Washington, D.C. The  
9 allegations relating to his conduct were based on  
10 activity which was not directly related to his  
11 position as a United States Senator and the General  
12 Counsel has concluded that not only are these not  
13 ordinary and necessary expenses, but they also would  
14 not -- they also would exist irrespective of his  
15 position as United States Senator pursuant to 2  
16 U.S.C. 439(a)(b).

17 So simply put, I have seen no justification  
18 from the General Counsel as to why not only has the  
19 General Counsel declined to apply the 439(a)(a)  
20 ordinary and necessary standard, but also in applying  
21 439(a)(b) irrespective standard, has determined that  
22 these legal expenses are not proper.

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1 I would also like to point out at this  
2 juncture, Senator Craig's travel was not just paid  
3 for by the United States government, it was  
4 Constitutionally mandated pursuant to the inhabitancy  
5 clause, which is Article I, Section 3, Clause 2 of  
6 the United States Constitution. He is obviously  
7 required to reside in the home state that he  
8 represents, the state of Idaho and, of course, that  
9 entails that he travel between Idaho and Washington,  
10 D.C.

11 Furthermore, his interaction with the  
12 arresting officer in Minneapolis was actually  
13 regulated and addressed by the United States  
14 Constitution in the immunity-from-arrest clause,  
15 which is Article I, Section 6, Clause 1 of the United  
16 States Constitution which provides that members of  
17 Congress are actually immune from being detained when  
18 they are traveling to and from their home district to  
19 Washington, and so his interaction during the course  
20 of events was actually regulated by the United States  
21 Constitution and he would have been authorized had he  
22 so chosen to have informed the arresting officer that

1 he could not be detained at that point and had to get  
2 on his flight and proceed to Washington. And so to  
3 the extent that this Commission were to find somehow  
4 that Kolbe did not govern this matter, we would also  
5 submit to the Commission that any analysis must take  
6 into account those Constitutional provisions  
7 governing his conduct.

8 Finally, I would just like to point out, as  
9 cited by the General Counsel pursuant to 2 U.S.C.  
10 437(f)(c), we are entitled to rely on previous  
11 opinions of this Commission and, again, quite  
12 honestly, we fail to see any daylight at all between  
13 this case and the facts and decision that were  
14 rendered in the Kolbe Advisory Opinion. I think that  
15 concludes my opening remarks.

16 CHAIRPERSON BAUERLY: Thank you.

17 I would open it up for questions from  
18 Commissioners.

19 Commissioner Petersen?

20 COMMISSIONER PETERSEN: Thank you, Madam  
21 Chair.

22 Thank you for that presentation. Just a few

1 questions. The explanation and justification for the  
2 Commission's rule relating to personal use and legal  
3 expenses, I will quote directly. It says legal  
4 expenses associated with a divorce or charges of  
5 driving under the influence of alcohol will be  
6 treated as personal rather than campaign or  
7 office-holder related. Isn't what happened here more  
8 akin to divorce proceedings or drunk driving, a legal  
9 matter arising from a drunk driving incident? And if  
10 not, how would you distinguish that sort of legal  
11 proceeding from what happened here in Senator Craig's  
12 matter?

13 MR. HERMAN: Well, initially I would have to  
14 take issue with the blanket analysis that a DUI would  
15 not be covered by this provision. I think you can  
16 certainly make an argument, say, if a member of  
17 Congress was returning from a caucus meeting where  
18 alcohol had been served and he was returning to his  
19 home from that meeting, that he would at least have a  
20 prima facie argument that these expenses stemming  
21 from the DUI would be related to his federal  
22 position. Certainly, if a member of Congress is

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1 returning from a personal party or even a party with  
2 other members of Congress, where he was detained  
3 after drinking, that would be one thing, but if he is  
4 returning from an official obligation where alcohol  
5 was served, which certainly occurs, then I just can't  
6 accept the blanket provision that all DUIs would not  
7 be covered by one of the two provisions in the  
8 statute.

9 In terms of a divorce proceeding, I know the  
10 operative Advisory Opinion relates to the receipt of  
11 veterans benefits and under the "not irrespective"  
12 analysis, the determination was that when you are  
13 expending legal fees relating to your eligibility for  
14 veterans benefits, certainly that is not related to  
15 your federal position. I just don't think that  
16 analysis applies here because the events took place  
17 attendant to officially-sanctioned travel.

18 As we pointed out in our brief, had there  
19 been a fee for using a restroom, for example, that  
20 would have been -- Senator Craig could have expensed  
21 that to his trip. So I can't see where you draw the  
22 line between when he is off the clock -- on the clock

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1 and off the clock. There is no distinction in this  
2 case between personal and private, the way there  
3 would be in divorce proceeding or mortgage on a house  
4 or if you wanted to use it for country club dues,  
5 something like that, where it is so distinctly  
6 private and outside of the official realm.

7 COMMISSIONER PETERSEN: If I can just -- so  
8 if I understand you correctly, let's say that there  
9 was a member of Congress driving home to his or her  
10 district after a session of Congress and was drinking  
11 along the way and got arrested for a DUI, you believe  
12 that would be in connection with that office-holder's  
13 official duties?

14 MR. HERMAN: I think if that office-holder  
15 were, say, at a caucus meeting, which is certainly  
16 related to his official duties and he was drinking at  
17 that meeting and then he got in his car and drove to  
18 his home, his home district, then, yes, I think he  
19 has a pretty good argument that that would be related  
20 to his official duties.

21 COMMISSIONER PETERSEN: Then this will be a  
22 hypothetical that sounds a little ludicrous, but it

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1 is just to get some clarity on the legal points. You  
2 think this explanation or justification cuts a little  
3 too broadly or makes too broad of a statement, but  
4 let's say you had a member of Congress whose wife  
5 said, if you run for Congress again and you get  
6 elected, I am going to divorce you; and then let's  
7 say he does get elected and the divorce papers are  
8 served; would it be your position that that is  
9 something that arose in connection with that  
10 office-holder's duties or in connection with his  
11 duties as a candidate, that the expenses of that  
12 divorce proceeding could be paid for with campaign  
13 funds?

14 MR. HERMAN: I think that would be a  
15 different question. I think probably not.

16 COMMISSIONER PETERSEN: I think another  
17 question I have is -- again, just to clarify, you  
18 think that the statement and the  
19 explanation/justification cuts just too broadly, it  
20 was too broad a statement regarding drunk driving,  
21 maybe not too broad a statement regarding divorce,  
22 but you think we need to take that language and you

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1 think there needs to be some distinctions drawn here?

2 MR. HERMAN: Yes, I do, and I think that E  
3 and J language is in conflict with Kolbe and some of  
4 your other advisory opinions as well.

5 COMMISSIONER PETERSEN: How broad does your  
6 argument extend once a member is engaging in official  
7 travel, how much coverage do they get? Let's say a  
8 member, for example, while on a layover on official  
9 travel, traveling back to his or her home state,  
10 shoplifts from a newsstand and is arrested for  
11 shoplifting, misdemeanor charge is brought up, would  
12 that be in connection with an office-holder's  
13 official duties?

14 MR. HERMAN: You are asking me to speculate  
15 on a hypothetical -- which I am happy to do.

16 COMMISSIONER PETERSEN: The reason why I am  
17 going through these, I realize these are not relevant  
18 in the sense that they don't relate to the facts of  
19 what happened in this underlying matter, but as a  
20 Commission we need to know what is the legal  
21 principle and where is the stopping point because if  
22 we adopt your argument, we have to know what are the

1 implications of this argument.

2 MR. HERMAN: Well, I will go down a  
3 dangerous road, which is try to bring up something I  
4 learned in law school and talk about it cogently, but  
5 I remember, as I am sure all of you do, the doctrine  
6 of respondeat superior, and the example that sticks  
7 in my head from law school is the truck driver  
8 working for a trucking company. Obviously, if he is  
9 driving down the street and he hits a car on the way  
10 to make a delivery, then respondeat superior is going  
11 to apply. If he is driving down the street and he  
12 hits a car because he is on his way to buy drugs,  
13 then the company has a pretty good argument that he  
14 wasn't authorized to do that on our time and our  
15 truck and we are not responsible for it. We can't  
16 control him if he is going to go off the clock, so to  
17 speak. The frolic and detour, as Stan points out.

18 In this case, let's be very, very clear  
19 about what occurred here because it tends to get  
20 lost. It has been lost to time and it has been lost  
21 to media sensationalism a little bit. The underlying  
22 charge in this case -- the charge that Senator Craig

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1 ultimately pled guilty to and the facts alleged in  
2 the police complaint, were that he tapped his foot  
3 inappropriately while using a men's room stall. He  
4 didn't take a baseball bat to a mirror. He didn't  
5 try to purchase illegal substances in the bathroom.  
6 He was adjudged to have utilized the bathroom in an  
7 inappropriate manner. He pled guilty to that for his  
8 own personal reasons, but the facts of this matter  
9 are clear. He was using a restroom at the time and  
10 the police officer didn't like the way he was using  
11 the restroom. We are not talking about a DUI. We  
12 are not talking about some other level of  
13 inappropriate conduct which can be clearly severed  
14 from what would be appropriate conduct that any of us  
15 would undertake were we on a similar business trip.  
16 Certainly for the purposes of this matter, that is  
17 where I would draw the line.

18 COMMISSIONER PETERSEN: So you would say  
19 shoplifting would be different, would be outside?

20 MR. HERMAN: Yes, I do. But potentially an  
21 accusation of shoplifting, say, if a member went into  
22 an airport gift shop and put something in his pocket

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1 for a second and then was accused of shoplifting -- I  
2 am not saying that shoplifting would be a per se  
3 charge that would fall out of the ordinary and  
4 necessary analysis. I think the Commission has to  
5 look at the facts of the matter as well, what is  
6 alleged and what they are responding to.

7 I don't think you want to leave open members  
8 from -- in reading your E and J relating to these  
9 regulations, you talk about the difference between a  
10 per se rule and a case-by-case analysis, and 439a(a)  
11 is essentially per se, and 439a(b) is case-by-case,  
12 and I think that analysis between the two is  
13 well-taken and I think you ought to be careful that  
14 you don't box yourself in and say all X conduct is  
15 not covered and all Y conduct is. These are  
16 obviously fact-specific situations.

17 COMMISSIONER PETERSEN: You bring up the  
18 Kolbe A0 and say that your client -- the facts in  
19 Senator Craig's circumstances are materially  
20 indistinguishable from those that were present in the  
21 Kolbe matter. One of the things that stood out -- I  
22 went back and reread this in preparation for this

1 hearing and obviously they do say that the Commission  
2 concluded that Mr. Kolbe's legal expenses in  
3 responding to the DOJ inquiry as well as the House  
4 ethics inquiry related to the trip to the Grand  
5 Canyon were considered ordinary and necessary in  
6 connection with his duties as a House member. There  
7 is a paragraph, the final paragraph in the section  
8 dealing with question one, which is the relevant  
9 question, which says: The Commission knows that  
10 the details of the preliminary inquiry by the  
11 Department of Justice are not public at this time and  
12 it is possible that the scope of the inquiry could  
13 involve allegations not related to Representative  
14 Kolbe's duties as a federal officer. Thus, the  
15 committee may not use campaign funds to pay for  
16 Representative Kolbe's legal expenses in the  
17 preliminary inquiry regarding other allegations, if  
18 any, that do not concern the candidate's campaign  
19 activities, or office duties as a federal  
20 office-holder.

21 Obviously, this opinion is rather skeletal  
22 and doesn't go into any further detail as to what

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1 would be considered conduct that would not relate to  
2 the candidate's or the office-holder's duties. But  
3 you think -- I gather it is your opinion that  
4 regardless of this language what happened with  
5 Senator Craig could and would still be related to his  
6 office-holder duties?

7 MR. HERMAN: It is my argument, and, like  
8 you, I went back and reread Kolbe very carefully  
9 yesterday as well, including the admissions made by  
10 the treasurer to the Commission and included among  
11 those are a number of newspaper articles detailing  
12 those allegations and they were all submitted by the  
13 treasurer along with his itinerary for the trip. If  
14 you look at the itinerary, it actually looks like a  
15 very nice trip with National Park Service and Grand  
16 Canyon personnel escorts and they went river-rafting  
17 and camped on the side of the river and so on and so  
18 forth. All of that is in the A0 record.

19 I would just submit that this is so much  
20 further afield of what would be considered the normal  
21 official duties of a member of Congress than passing  
22 through Minneapolis airport on your way to Washington

1 where you are stationed.

2 COMMISSIONER PETERSEN: One final question I  
3 have relates to language that was quoted on page 3 of  
4 General Counsel's brief. It quotes a letter, says  
5 letter from Stan Brand, counsel to Larry Craig, to  
6 U.S. Senate Select Committee on Ethics, and the  
7 relevant portion that is quoted in the brief says:  
8 Counsel argued that Craig's arrest and conviction  
9 was, quote, purely personal conduct unrelated to the  
10 performance of official Senate duties, end quote, and  
11 that because his actions, quote, were unrelated to  
12 his duties in Congress, end quote, the SE, the Senate  
13 Ethics Committee, did not have jurisdiction to review  
14 this matter.

15 Two questions: First of all, is that an  
16 accurate depiction of the letter that was submitted  
17 to the Ethics Committee, and, if it is, and your  
18 contention was they didn't have jurisdiction to  
19 handle it because it was a purely personal matter,  
20 your argument here appears -- is a very different  
21 contention, that this was absolutely in connection  
22 with the performance of his official Senate duties

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1 and just wanted your explanation, if there is a  
2 difference, how you arrived at the different  
3 conclusion in this matter.

4 MR. HERMAN: I think they are completely  
5 different and I don't think there is tension between  
6 those arguments. We are certainly not making a claim  
7 that the underlying charges were directly related to  
8 his duties as an office-holder. When you look at  
9 what the Senate Ethics Committee's charge is, it is a  
10 political -- obviously it is a political  
11 organization. Their concern is addressing the  
12 fundamental aspects of behavior of members of its  
13 body. They would certainly -- their rules certainly  
14 say all members are expected to conduct themselves  
15 with the most probity, so on and so forth. They have  
16 never exercised jurisdiction over its 200-plus year  
17 history of any kind of conduct like this and have  
18 declined to do so on numerous occasions.

19 So our argument to them is that this is  
20 simply not something in their handbook. The  
21 Commission's charge and jurisdiction are certainly  
22 not co-terminus with the Ethics Committee and I

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1 simply don't think it is relevant for this.

2 COMMISSIONER PETERSEN: Thanks. That is  
3 all.

4 CHAIRPERSON BAUERLY: Commissioner  
5 Weintraub?

6 COMMISSIONER WEINTRAUB: Now I am completely  
7 confused. I can't tell whether you are arguing this  
8 is or is not in connection with his official duties  
9 or whether it is or is not related to his status as  
10 an office-holder. Because I think I heard you say  
11 both things. I mean, you just said you weren't  
12 arguing that this was directly related to his duties  
13 as an office-holder, but earlier I thought you said  
14 it was. So I don't know what your argument is.

15 MR. HERMAN: Let me state it as clearly as I  
16 am able. Certainly we are not making the allegation  
17 that one's conduct in a restroom has any bearing on  
18 your duties as an office-holder. I don't think that  
19 is relevant for this Commission's analysis. It  
20 certainly wasn't relevant for this Commission's  
21 analysis in the Kolbe matter. You in no way looked  
22 beyond the fact that he was on a

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1 Congressionally-sanctioned trip. There was no  
2 analysis of what his conduct entailed, whether his  
3 behavior related to his official duties or not.

4 If you look at the Cunningham analysis, I  
5 believe from 2007, if I am not mistaken, where this  
6 Commission allowed him to pay for his legal expenses  
7 related to charges that he lived rent free on a boat  
8 and had someone buy his house at an above-market  
9 price, the Commission undertook no analysis about  
10 whether or not that conduct was directly related to  
11 his status as a federal office-holder.

12 So I don't think we are under any obligation  
13 to make an assertion that Senator Craig's conduct  
14 -- that the conduct at the heart of the legal matter  
15 directly related to his status as an office-holder.

16 COMMISSIONER WEINTRAUB: I am not saying you  
17 are obliged to make that argument. I am just trying  
18 to find out what your argument is.

19 MR. HERMAN: My argument is he was on an  
20 officially-sanctioned trip where he was detained in  
21 the bathroom and his legal expenses for that  
22 detention are covered by 439a(a) and that is as far

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1 as this Commission can go with this analysis.

2 COMMISSIONER WEINTRAUB: If he had been  
3 arrested for shoplifting in the same airport, would  
4 that have been different?

5 MR. HERMAN: I think it depends on what the  
6 situation is.

7 COMMISSIONER WEINTRAUB: If a Senator were  
8 arrested for shoplifting in an airport while in  
9 transit from Washington to his home state, would that  
10 be something you would say would be covered?

11 MR. HERMAN: I think arguably, yes.

12 COMMISSIONER WEINTRAUB: In the scenario you  
13 posited earlier, a member attends a caucus meeting  
14 and is served call alcohol there and then leaves that  
15 event, let's say if it is not a DWI, who walks out  
16 and gets into a brawl on the street and someone is  
17 seriously injured or killed as a result of that, and  
18 he has a criminal charge as a result of that, he is  
19 en route from caucus to home, can you cover his  
20 criminal defense costs with campaign funds?

21 MR. HERMAN: I think arguably yes.

22 COMMISSIONER WEINTRAUB: Arguably? Are you

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1 making that argument?

2 MR. HERMAN: I am making that argument.  
3 Certainly the United States Constitution takes into  
4 account the fact that members of Congress have to  
5 travel from Washington to their district back and  
6 forth and their conduct during that travel may become  
7 an issue.

8 COMMISSIONER WEINTRAUB: But you previously  
9 brought up the respondeat superior/frolic and detour  
10 argument. So what would constitute -- if shoplifting  
11 or killing someone in a drunken brawl wouldn't  
12 constitute a frolic and detour, what actually would?

13 MR. HERMAN: I don't know. I don't think it  
14 is my obligation to speculate as to the outer  
15 boundaries of the line.

16 COMMISSIONER WEINTRAUB: You brought up the  
17 frolic and detour --

18 MR. HERMAN: I did in response to a  
19 hypothetical.

20 COMMISSIONER WEINTRAUB: What would that  
21 include?

22 MR. HERMAN: I think when you are on an

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1 officially-sanctioned trip, your behavior is pretty  
2 much covered. This is not a doctrine that I am  
3 inventing. I am taking it directly from this  
4 Commission's own Advisory Opinion.

5 COMMISSIONER WEINTRAUB: So there is no  
6 frolic and detour. There is nothing that they could  
7 do that would be outside the bounds?

8 MR. HERMAN: You are asking me to speculate  
9 on facts not at issue in this matter.

10 COMMISSIONER WEINTRAUB: I am asking you  
11 what your argument means. You brought up the frolic  
12 and detour argument. I am trying to figure out what  
13 that would be.

14 MR. HERMAN: Certainly I could invent a  
15 hypothetical where I think perhaps it wouldn't be  
16 covered. If you left a caucus event, we will say,  
17 and you drove to a bar and you sat at the bar for  
18 three hours and then you got drunk and then you were  
19 arrested for a DUI, I think that would be a different  
20 issue than if you left a caucus event where you had  
21 been drinking and were detained --

22 COMMISSIONER WEINTRAUB: Because there was

1 an intervening act?

2 MR. HERMAN: There was an intervening act.  
3 Because to some degree you were off the clock at that  
4 point. You are asking me to speculate on facts that  
5 are not at issue here.

6 CHAIRPERSON BAUERLY: I would like to  
7 follow-up a little bit on a couple of the AOs you  
8 mentioned, particularly Cunningham. I read the AO  
9 differently because I think the Commission on the  
10 bottom of page 3 says that the allegations about what  
11 Representative Cunningham obtained, the benefits and  
12 sale of the house from Mr. Wade who was a federal  
13 contractor were because of his status as a U.S.  
14 Representative and his position on the Permanent  
15 Committee on Intelligence and the House  
16 Appropriations Defense Committee, someone who would  
17 have some sway with those departments in letting that  
18 federal contract. To me there is a nexus to his  
19 official duties in terms of whether the contractor  
20 wanted to hand him cash or buy his house from him,  
21 the contractor was trying to influence him in his  
22 official decision-making capacity.

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1           So I think that to me is very  
2 distinguishable. Yes, the standard is the same, for  
3 all of these cases, but the facts are, as you pointed  
4 out -- we handle these on a case-by-case basis and  
5 the facts are critical. Cunningham to me is fairly  
6 distinguishable.

7           I will give you an opportunity to respond to  
8 that because I know it is a case you mentioned, and  
9 you just did as well, but my reading of it is that  
10 Mr. Wade, as a federal contractor, was alleged to  
11 have given these benefits to him because of his  
12 position and his being able to influence a federal  
13 contract.

14           MR. HERMAN: Essentially it was a bribe or  
15 alleged to be a bribe, and I would agree that  
16 certainly there is a closer nexus to your -- to  
17 Cunningham's official duties than, say, in the Kolbe  
18 case and this case.

19           I might just point out though, the standard  
20 is not the nexus and certainly that is language that  
21 this Commission has used in its communication with us  
22 prior on this case, although not in the General

1 Counsel's brief and that analysis does not appear  
2 anywhere in the statute or in the regulations. The  
3 phrase is "for ordinary and necessary expenses in  
4 connection with," and I would submit "in connection  
5 with" is -- it is certainly not -- it is a fairly  
6 vague term, "in connection with," as I think  
7 Commissioner Weintraub identifies in her response to  
8 our argument. There is a significant amount of  
9 vagueness in that provision.

10           The analysis of "in connection with" goes  
11 much, much further than simply bribing a member of  
12 Congress. There are all kinds of activities that  
13 members take in connection with their official duties  
14 which are not strictly covered by their official  
15 duties, for example, the Boehner and McDermott  
16 matters involving an intercepted phone call from a  
17 private citizen that was passed along and then  
18 disseminated to reporters. That is not something --  
19 an activity normally undertaken by members of  
20 Congress, but the Commission had no difficulty in  
21 that matter resolving the issue in favor of allowing  
22 them to use campaign funds to pay for those legal

1 expenses related to that event.

2           So -- I would submit it is a much broader  
3 analysis than simply a close nexus to your official  
4 position.

5           CHAIRPERSON BAUERLY: Well, certainly those  
6 words have slightly different meanings, but I guess  
7 my point was you were suggesting that Cunningham was  
8 about the sale of a house and about the benefits he  
9 incurred. The allegations were he received those  
10 benefits because of his position and I am just trying  
11 to -- this is all about line-drawing. That is what  
12 we are doing.

13           With respect to Kolbe, as I understood the  
14 description of the Department's inquiry regarding the  
15 interaction between members of Congress and pages and  
16 former pages, that was also the nexus of  
17 their -- that was the reason they were looking at  
18 this trip. While I agree with you that the  
19 paragraphs you cited focus on the fact that this was  
20 an official trip, the facts that were presented to  
21 the Commission are all part of the Advisory Opinion  
22 and it is very clear what the Department was looking

1 at was this interaction -- certainly interactions  
2 between Mr. Kolbe and other members and pages and  
3 former pages and obviously pages work for the House  
4 of Representatives and their interaction is covered  
5 by the code of conduct. I have not worked in the  
6 House of Representatives, I know other members have,  
7 but that is to me also a distinguishing factor and I  
8 wonder if you wanted to address that.

9 MR. HERMAN: If my memory serves, I believe  
10 they were former pages that were on the trip with  
11 him, to the extent that that matters for your  
12 analysis. But to me the thing that is most material  
13 about Kolbe is essentially when you review the  
14 Advisory Opinion, what this Commission said is,  
15 Kolbe's treasurer informed us that this trip was  
16 taken under the auspices of his office as a member of  
17 Congress and essentially that was sufficient for us  
18 to determine that these were ordinary and necessary  
19 expenses, and I just cannot see any daylight between  
20 that analysis and the facts in this case that Senator  
21 Craig was on an official trip back to Washington when  
22 this conduct occurred. I simply cannot see a

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1 difference between Kolbe and this case.

2 The General Counsel refers to Kolbe and says  
3 it is distinguishable from Kolbe, but I don't believe  
4 the General Counsel ever explains why our matter is  
5 distinguishable from Kolbe.

6 CHAIRPERSON BAUERLY: My question is, is it  
7 not distinguishable in the fact that these were House  
8 employees, pages, that the interaction with the  
9 member was the focus of the inquiry. Whether they  
10 were former or not, I don't know, I wasn't involved  
11 in the DOJ investigation, they might have been  
12 looking at the conduct of those members and  
13 any -- whether any of it was improper while they were  
14 pages or employees of the House, whether they were  
15 former at the time of that trip, there might have  
16 been information gained by Kolbe or others on that  
17 trip that may have been useful to DOJ in its  
18 investigation.

19 MR. HERMAN: The AO discusses the  
20 investigation into Congressman Kolbe's conduct on the  
21 trip. So I think it is broader than your  
22 characterization. It was conduct during the course

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1 of the rafting trip in the Grand Canyon which is one  
2 of the reasons why the treasurer submitted his  
3 itinerary for that trip.

4 CHAIRPERSON BAUERLY: I understood that part  
5 of the inquiry was about whether Representative Kolbe  
6 had received information about the interaction of  
7 members -- I believe at one point one of the pages  
8 had come to him because he had been on the page  
9 committee or something like that so he had some  
10 official role in the page program.

11 MR. HERMAN: That was the first half of the  
12 request and the first half of the Commission's  
13 analysis. I don't want to be too pedantic, but I can  
14 certainly read the operative language from the  
15 Advisory Opinion, if you would like.

16 CHAIRPERSON BAUERLY: I have the Advisory  
17 Opinion in front of me. Thank you. My point is we  
18 don't know the full extent of what DOJ was looking  
19 at. As I read this Advisory Opinion it seemed to be  
20 looking at a couple of aspects, but it is hard to  
21 know what they were interested in on the trip, but it  
22 says, I can read the Advisory Opinion as well, the

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1 conduct on the trip -- I wasn't here at the  
2 Commission, maybe this is not the language I would  
3 have put in if I were here, but it seems to me it is  
4 all very -- since we don't know exactly what the  
5 inquiry was and this is why we often put in language  
6 as Commissioner Petersen pointed out, if the scope of  
7 the inquiry goes beyond what we are told of, because  
8 we are not told -- DOJ doesn't tell us what they are  
9 doing, we get it from the requester. It all seems to  
10 be tied together and the interaction between certain  
11 members and certain interactions and those are with  
12 employees of the House and former employees of the  
13 House and it is hard to draw a lot of lines from that  
14 limited set of information, but that to me is a very  
15 distinguishable factor.

16 MR. HERMAN: Obviously, the language of the  
17 opinion will speak for itself. I just would point  
18 out, as you know, under 437f(c), we are entitled to  
19 rely on this Commission's opinions in terms of  
20 conforming our conduct to that guidance and we feel  
21 comfortable relying on the language in Kolbe for our  
22 position.

1 CHAIRPERSON BAUERLY: Commissioner  
2 Weintraub?

3 COMMISSIONER WEINTRAUB: You don't get to  
4 make a personal determination on that point: Well,  
5 we think it is analogous so that is good enough. I  
6 think what you are hearing is members of this panel  
7 do actually find it distinguishable. The facts that  
8 are represented in the Advisory Opinion, if you want  
9 to go back to the words, the representation was that  
10 Representative Kolbe took the trip under the auspices  
11 of his office in light of his oversight role on the  
12 House Appropriations Interior Subcommittee. Now  
13 members consider all sorts of things to be under  
14 their oversight role and not for us to say whether a  
15 trip down the Grand Canyon was appropriately under  
16 his oversight role or not, but we also very  
17 specifically said, if this investigation involves  
18 other stuff that is not related to Representative  
19 Kolbe's duties as a federal office-holder, the  
20 committee may not use campaign funds to pay for  
21 Representative Kolbe's legal expenses in the  
22 preliminary inquiry regarding other allegations, if

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1 any. We weren't getting into all of the details  
2 here, that you not consider the candidate's campaign  
3 activity or duties as a federal office-holder and you  
4 seem to be reading that sentence out of the opinion  
5 and assuming it had no meaning, but it did have  
6 meaning.

7 MR. HERMAN: I don't have the documents on  
8 me, I didn't bring them, but if one wishes to go back  
9 and look at all of the supporting documents for the  
10 Advisory Opinion, Congressman Kolbe's treasurer  
11 submitted about 30 pages of newspaper articles from  
12 various national newspaper publications and other  
13 media which detail a number of the activities that he  
14 was alleged to have undertaken on this trip and it  
15 involves essentially inappropriate conduct with  
16 former pages and so -- in fact, I know that this  
17 committee had all of that information before it made  
18 that determination.

19 COMMISSIONER WEINTRAUB: However, that is  
20 not what is in the Advisory Opinion. What you can  
21 rely on is not newspaper articles submitted to the  
22 Commission but what the Commission said and we did

1 not in any way say that we were covering expenses  
2 that related to inquiries about improper conduct.  
3 What we said was campaign expenses could be used  
4 about an inquiry into the -- a trip that was taken  
5 under the auspices of his oversight role on the House  
6 Appropriations Interior Committee.

7           You may think you know what we meant when we  
8 said those words, but I was here and I know there is  
9 a reason why that language is in there that qualifies  
10 the opinion and says, if this gets into areas that  
11 are beyond your duties as a federal office-holder, or  
12 your campaign activities, then that is off the table.  
13 That is what that language means.

14           MR. HERMAN: With all due respect,  
15 Commissioner Weintraub, I beg to differ. I have no  
16 answer beyond the answer I have given you.

17           COMMISSIONER WEINTRAUB: You beg to differ  
18 that that wasn't our intent? How would you know?

19           MR. HERMAN: I know what facts the  
20 Commission had before it because I have seen the  
21 facts included and I simply -- I don't think it is  
22 supportable that the Commission can claim that it

1 didn't understand what the allegations were behind  
2 Congressman Kolbe's conduct when it issued its  
3 opinion.

4 COMMISSIONER WEINTRAUB: What the opinion  
5 says is that it can cover some expenses, but there is  
6 a category of expenses that it may not be able to  
7 cover and you want to pretend that that sentence is  
8 not there or that it doesn't mean anything.

9 MR. HERMAN: It says specifically, the  
10 Commission notes that the details of the preliminary  
11 inquiry by the Department of Justice are not public  
12 at this time. The documents cited -- or the  
13 documents provided to the Commission were public  
14 documents so it could not have been referring to any  
15 of those public allegations.

16 COMMISSIONER WEINTRAUB: No, we were  
17 referring to what was under investigation at the  
18 Department of Justice which was not public. People  
19 speculated on that based on what was in the  
20 newspapers. But what was actually under  
21 investigation was not public and we didn't get into  
22 the details of that in the Advisory Opinion.

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1 MR. HERMAN: Okay.

2 CHAIRPERSON BAUERLY: Commissioner Hunter?

3 COMMISSIONER HUNTER: Thank you, Madam  
4 Chair.

5 I would like to talk a little bit more about  
6 the process of this case. As you may know, we  
7 haven't talked about this case or looked at it in  
8 almost a year. The Commission voted to go to RTB and  
9 to proceed with pre-probable cause conciliation and  
10 one of the things that the Commission afforded the  
11 opportunity for respondents to do is to demonstrate  
12 whether the expenses were appropriate to be paid by  
13 the campaign or not and my question is in the course  
14 of the pre-probable cause conciliations, did you have  
15 an opportunity to have this sort of conversation that  
16 we are having today and to demonstrate your theory  
17 about how you thought the expenses should be paid?

18 MR. HERMAN: Our argument has been  
19 consistent in writing from the outset of this case.  
20 And in fact, to be perfectly frank, in preparing my  
21 response to the General Counsel's brief, I  
22 essentially cut about 80 percent of what I wrote way



1 back when this case started and pasted it into the  
2 new document. Certainly in correspondence our  
3 argument has remained almost identical from the  
4 beginning of this process to date.

5 COMMISSIONER HUNTER: Which document are you  
6 referring to, the one that you copied and pasted?

7 MR. HERMAN: Our first response to the  
8 Commission. I am sorry I am not completely well  
9 versed in the terminology. Whatever our initial  
10 response to the Commission's initial inquiry to us  
11 --

12 COMMISSIONER HUNTER: Was it a letter from  
13 Larry Craig with a three-page letter attached?

14 CHAIRPERSON BAUERLY: Maybe the staff can  
15 help us with that?

16 MS. BROUSSARD: I believe that what counsel  
17 and the Commission is speaking of is the response to  
18 the legal analysis where the Commission's RTB  
19 findings which were approximately in 2009 --

20 MR. HERMAN: I am sorry, Shana, I think it  
21 was August 10, 2009, and that is responding to a May  
22 24, 2010 -- sorry, no, no.

1 COMMISSIONER HUNTER: I have that letter.

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8 COMMISSIONER HUNTER:

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10 For the  
11 sake of argument, let's assume the Commission is  
12 divided on the legal question. What might be a way  
13 for the Commission to preserve its interests in  
14 enforcing the law but to sort of say that there are  
15 different ways to interpret these AOs and this legal  
16 question.

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20 MR. HERMAN: I am not prepared to answer  
21 that question. I am sorry, I just wouldn't feel that  
22 it is fair to my client to answer that without

1 talking to him first, but I am certainly happy to  
2 take that back to Senator Craig if the Commission  
3 were to request us to do that and to provide a  
4 written response to the question.

5 COMMISSIONER HUNTER: I can't ask that on my  
6 own. We have to have a vote on that kind of stuff  
7 and we can't do that in this forum.

8 CHAIRPERSON BAUERLY: And we can't do that  
9 in this forum.

10 COMMISSIONER HUNTER: But thank you for  
11 that.

12 CHAIRPERSON BAUERLY: Any further questions?  
13 Commissioner Walther?

14 COMMISSIONER WALTHER: Just looking at the  
15 Kolbe opinion, it is a case-by-case basis, okay, and  
16 we look at the Kolbe opinion, we look at other  
17 opinions, this is one where there is conduct for  
18 which there is a plea of guilty. It is not related  
19 to any federal employee, it is not related to any  
20 formal trip with other people -- you can say it is a  
21 federal trip, but then every trip is an official trip  
22 if you are going to and from home.

1           Where we draw lines, is that the nexus, the  
2 distance between one place and another, that  
3 inoculates a person, a Senator, because in theory,  
4 when you are a Senator, everything you do is often  
5 Senatorially related. So we are drawing lines here.  
6 I say it is cabined in with respect to Kolbe. I am  
7 not saying how -- we have all of the facts, it was  
8 inconsistent -- the investigation by investigative  
9 authorities is limited to alleged violations of codes  
10 of official conduct, of an applicable rules or  
11 regulations regarding the performance of official  
12 duties or discharge of official responsibilities.  
13 The Commission concludes therefore that  
14 Representative Kolbe's legal expenses raised in the  
15 House Ethics Committee inquiry were ordinary and  
16 necessary expenses incurred in connection with this  
17 duties as a member of the House of Representatives.  
18 The Department of Justice preliminary inquiry  
19 concerned information in order to obtain regarding  
20 interaction between another member of Congress and  
21 current or former pages.  
22           So to the extent that Representative Kolbe

1 acquired the information because of the status of the  
2 federal office-holder, the Commission concludes --  
3 the people involved, the place, the situation, was  
4 federal in nature. It actually had relationships  
5 with people over which if he didn't have direct  
6 oversight, certainly he had responsibilities, so for  
7 me -- if we are applying the case-by-case basis  
8 approach, we have grave conduct, no individual  
9 involved, tapping his feet, for criminal conduct that  
10 has been, regardless of the gravity or sincerity, it  
11 has been agreed upon, so then we have to start  
12 looking at a case-by-case basis. Where are we going  
13 to draw our own lines? That is where I am.

14 MR. HERMAN: I think Senator Craig's matter  
15 is more central than Congressman Kolbe's matter.  
16 This is a federally appropriated trip, paid for with  
17 United States Senate money that enables him to get  
18 back and forth to his home district.

19 Also, let me emphasize, there is a  
20 case-by-case -- it is the nature of any Advisory  
21 Opinion, but the FEC didn't consider this to be a  
22 close case. They didn't send it to the 439a(b),

1 case-by-case analysis. They just found it was simply  
2 ordinary and necessary under 439a. This is not a  
3 close case for the Commission. This was a slam-dunk.

4 COMMISSIONER WALTHER: I was there too. I  
5 am not sure it was a slam-dunk.

6 MR. HERMAN: 439a(b) specifically references  
7 legal expenses. So if the Commission felt like it  
8 needed to do a circumstantial analysis, I would have  
9 expected it to have decided it under 439a(b). They  
10 did not do that. They decided it under the much  
11 broader 439a(a).

12 COMMISSIONER WALTHER: The next sentence  
13 says 439a(b).

14 MR. HERMAN: The terminology is ordinary and  
15 necessary expenses. That is the language of 439a(a).  
16 I understand they reference 439a(b).

17 COMMISSIONER WALTHER: That is all the  
18 questions I have. I am trying to draw a line in the  
19 sand here.

20 (Pause.)

21 CHAIRPERSON BAUERLY: I am recognizing Vice  
22 Chair Hunter. I am not sure this question is in

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1 order because I don't believe that an  
2 individual -- the question is whether Commissioners  
3 can ask questions and ask for follow-up information  
4 which I believe we have done in a prior matter to the  
5 extent that it is factual in nature relating to the  
6 underlying issue. Procedural questions I don't -- it  
7 is not clear to me would be in order.

8 COMMISSIONER HUNTER: At the risk of getting  
9 called out of order and getting thrown in FEC jail, I  
10 guess I just want to go back to my question

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17 CHAIRPERSON BAUERLY: I will ask our

18 counsel's office if our procedures -- if there is a  
19 procedure for dealing with that sort of question.

20 MR. HUGHEY: This might be the language: At  
21 the probable cause hearing the Commission may request  
22 that a respondent supplementary information or brief

1 additional issues.

2 CHAIRPERSON BAUERLY: There does not seem to  
3 be any distinction between factual and procedural  
4 issues in that language?

5 MR. HUGHEY: I don't think so. The point I  
6 would make though is it says, the Commission may  
7 request.

8 CHAIRPERSON BAUERLY: That would suggest to  
9 me it would be at least a consensus of four on the  
10 Commission to request the information.

11 COMMISSIONER HUNTER: Chris, I am sorry,  
12 could you read that again?

13 MR. HUGHEY: At the probable cause hearing  
14 the Commission may request that a respondent submit  
15 supplementary information or brief additional issues.  
16 To the extent that the Commission requests this  
17 information or briefing from the respondent, the  
18 respondent will have generally 10 days after the  
19 hearing to submit these materials unless the  
20 Commission imposes a different deadline.

21 COMMISSIONER HUNTER: Is anybody else  
22 interested in the information?

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1 MR. HUGHEY: Given this is an internal  
2 policy, it is up to you to determine what "the  
3 Commission" means in that language. If you want it  
4 to mean a Commissioner with consent of other  
5 Commissioners, that is within your discretion.

6 CHAIRPERSON BAUERLY: I guess from my  
7 perspective, we are at a certain procedural point.  
8 We are at a probable cause and conciliation is  
9 effectively closed until we reach the next point. I  
10 will not object to my colleague asking for additional  
11 information if that is something that is useful to  
12 her consideration of the matter. I will ask my other  
13 colleagues if anyone would object to that question,  
14 but I don't think -- at least from my perspective, I  
15 wouldn't necessarily make that same request.

16 Commissioner Weintraub?

17 COMMISSIONER WEINTRAUB: Thank you, Madam  
18 Chair.

19 I guess I am puzzled by the request. The  
20 Commission can't in executive session -- this hearing  
21 is designed for them to have an opportunity to  
22 present their argument, which I think we have

1 provided. If we choose to vote probable cause, not  
2 vote probable cause, go back into conciliation,  
3 whatever next steps we choose to do, would be a  
4 decision for a Commission to make in a subsequent  
5 executive session. I don't think we ought to have  
6 that debate in front of respondents at this hearing.

7 COMMISSIONER HUNTER: I respectfully  
8 disagree. We have a requirement in the law to  
9 encourage voluntary compliance.

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14 I think the  
15 respondent makes some credible arguments. I am not  
16 sure I am 100 percent there. I think there are good  
17 arguments on both sides and I am trying to think  
18 about other ways to fix this and as you know,

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3 CHAIRPERSON BAUERLY: I think the challenge  
4 is we are in a probable cause hearing which is  
5 designed for a very specific purpose which is to  
6 allow the respondent to present argument in addition  
7 to their papers and the Commission cannot engage in  
8 any other deliberation at this meeting. It wasn't  
9 sunshined as an executive meeting. It would be  
10 inappropriate to have an executive meeting that does  
11 not include respondent's counsel.

12 I am just trying to keep us in line with our  
13 own rules in terms of what this hearing was designed  
14 to be, what it was set up to be.

15 COMMISSIONER HUNTER: I think we will have  
16 to disagree over what Mr. Hughey read. Maybe we can  
17 retroactively sunshine it. I don't know how that  
18 works.' But --

19 CHAIRPERSON BAUERLY: We may have to.

20 COMMISSIONER HUNTER: I think it is  
21 important that we have an opportunity to speak to  
22 respondents. I wasn't in the conciliation agreement.

1 I don't want to be in it. I wasn't there, but since  
2 I wasn't a part of this -- this case has been going  
3 on for two years and I think it is important to get  
4 as much information as we can while we have the  
5 opportunity to do so.

6 CHAIRPERSON BAUERLY: Commissioner  
7 Weintraub?

8 COMMISSIONER WEINTRAUB: Thank you, Madam  
9 Chair.

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16 COMMISSIONER HUNTER: Obviously that is not  
17 what I am doing. I am asking for further  
18 information, and I believe it is consistent with  
19 policy and I have done it in the past.

20 CHAIRPERSON BAUERLY: Any other  
21 Commissioners have views on the topic?

22 Commissioner Weintraub?

1 COMMISSIONER WEINTRAUB: Not to belabor the  
2 point, but I am pretty sure I know what was  
3 contemplated by the policy because I wrote it and  
4 this is not what I contemplated.

5 CHAIRPERSON BAUERLY: Commissioner Petersen?

6 COMMISSIONER PETERSEN: I don't object to a  
7 request for information. Obviously, there is a limit  
8 to what else we can say here, but I don't object to  
9 the request for information.

10 CHAIRPERSON BAUERLY: Commissioner Walther?

11 COMMISSIONER WALTHER: Well, Commissioner, I  
12 understand you are asking for information,  
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21 As far as other information, I am not  
22 exactly sure what would be forthcoming.

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More information, I am not sure what you would want to do. I don't object to having ongoing discussions, but I am concerned about the position you are putting them in.

MR. HERMAN: We will share whatever request is made by the Commission with our client and respond quickly.

COMMISSIONER WALTHER: Again, I don't understand what you are looking for.

What are you thinking?

COMMISSIONER HUNTER: Are you talking to me?

COMMISSIONER WALTHER: Yes. Further communication with the Office of General Counsel --

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MR. HERMAN: I hear you loud and clear.

COMMISSIONER WEINTRAUB: We are just not there.

MR. HERMAN: I understand.

CHAIRPERSON BAUERLY: The vice chair has requested for additional information. If any other Commissioners have additional issues, we should let the respondents know. The procedure allows for -- Mr. Hughey, how many days for a response?

MR. HUGHEY: 10 days unless otherwise specified.

CHAIRPERSON BAUERLY: 10 days seems appropriate. Again, from my perspective, the policy envisioned briefing on legal or factual issues rather than procedural issues, but I don't believe anyone is objecting to this particular request, although I find it fairly unusual for our procedure.

Are there any other questions from Commissioners?

Mr. Hughey, do you have any questions?



1 MR. HUGHEY: I just have one or two. With  
2 respect to your constitutional argument about the  
3 privilege-from-arrest clause, is it your contention  
4 that that applies to criminal misdemeanor arrests as  
5 opposed to civil arrests?

6 MR. HERMAN: Yes.

7 MR. HUGHEY: And in your documents you cited  
8 that constitutional provision but no case law  
9 interpreting it; is that correct?

10 MR. HERMAN: Yes.

11 CHAIRPERSON BAUERLY: Mr. Palmer, do you  
12 have any questions?

13 MR. PALMER: Madam chairman, I don't.

14 CHAIRPERSON BAUERLY: Are there any other  
15 questions?

16 Mr. Herman, you have approximately 10  
17 minutes left, if you would like to make a closing  
18 statement?

19 MR. HERMAN: I do not want to. Thank you  
20 very much.

21 CHAIRPERSON BAUERLY: Thank you for your  
22 time, counsel. We appreciate it.

1           This problem cause hearing is adjourned.  
2           (Whereupon, at 11:13 a.m., the hearing was  
3 adjourned.)

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## CERTIFICATE OF REPORTER

I, CATHY JARDIM, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me stenographically and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

---

CATHY JARDIM

# CONFIDENTIAL

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# PROBABLE CAUSE HEARING: MUR 6128

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<p>41:14, 43:8, 43:12, 46:21, 47:17, 48:2, 48:8, 49:6, 51:3, 51:19, 52:6, 52:20, 53:5, 53:10, 56:7, 56:14, 57:11, 57:14, 57:21</p> <p>bearing [1] - 23:17</p> <p>become [1] - 26:6</p> <p>beg [2] - 38:15, 38:17</p> <p>beginning [1] - 41:4</p> <p>behavior [3] - 22:12, 24:3, 27:1</p> <p>behind [1] - 39:1</p> <p>belabor [1] - 53:1</p> <p>benefits [6] - 12:11, 12:14, 28:11, 29:11, 31:8, 31:10</p> <p>between [17] - 5:7, 9:9, 10:12, 12:22, 13:2, 18:9, 18:12, 22:5, 31:15, 32:2, 32:19, 33:1, 35:10, 44:2, 44:20, 48:3, 54:2</p> <p>beyond [4] - 23:22, 35:7, 38:11, 38:16</p> <p>bit [3] - 16:21, 28:7, 40:5</p> <p>blanket [2] - 11:14, 12:6</p> <p>boat [1] - 24:7</p> <p>body [1] - 22:13</p> <p>Boehner [1] - 30:15</p> <p>bottom [1] - 28:10</p> <p>boundaries [1] - 26:15</p> <p>bounds [1] - 27:7</p> <p>box [1] - 18:14</p> <p>brand [1] - 5:5</p> <p>BRAND [1] - 3:2</p> <p>Brand [2] - 3:4, 21:5</p> <p>brawl [2] - 25:16, 26:11</p> <p>bribe [2] - 29:14, 29:15</p> <p>bribing [1] - 30:11</p> <p>brief [9] - 6:8, 7:22, 12:18, 21:4, 21:7, 30:1, 40:21, 47:22, 48:15</p> <p>briefing [2] - 48:17, 56:16</p> <p>briefs [1] - 5:18</p> <p>bring [3] - 16:3, 18:17, 37:8</p> <p>broad [4] - 14:3,</p>	<p>14:20, 14:21, 15:5</p> <p>broaden [3] - 31:2, 33:21, 46:11</p> <p>broadly [2] - 14:3, 14:19</p> <p>brought [4] - 15:11, 26:9, 26:16, 27:11</p> <p>BROUSSARD [2] - 2:10, 41:16</p> <p>business [2] - 7:21, 17:15</p> <p>buy [3] - 16:12, 24:8, 28:20</p> <p>BY [1] - 5:21</p>	<p>59:18</p> <p>caucus [6] - 11:17, 13:15, 25:13, 25:19, 27:16, 27:20</p> <p>CAUSE [1] - 1:7</p> <p>central [1] - 45:15</p> <p>certain [3] - 35:10, 35:11, 49:7</p> <p>certainly [24] - 7:2, 11:16, 11:22, 12:5, 12:14, 13:15, 17:16, 22:6, 22:13, 22:21, 23:16, 23:20, 26:3, 27:14, 29:16, 29:20, 30:5, 31:5, 32:1, 34:14, 41:2, 43:1, 45:6</p> <p>CERTIFICATE [1] - 59:1</p> <p>Chair [5] - 10:21, 40:4, 46:22, 49:18, 52:9</p> <p>chair [1] - 56:7</p> <p>chairman [1] - 57:13</p> <p>CHAIRPERSON [29] - 5:3, 10:16, 23:4, 28:6, 31:5, 33:6, 34:4, 34:16, 36:1, 40:2, 41:14, 43:8, 43:12, 46:21, 47:17, 48:2, 48:8, 49:6, 51:3, 51:19, 52:6, 52:20, 53:5, 53:10, 56:7, 56:14, 57:11, 57:14, 57:21</p> <p>Chairperson [3] - 2:2, 2:3, 4:7</p> <p>challenge [1] - 51:3</p> <p>characterization [2] - 6:10, 33:22</p> <p>charge [7] - 15:11, 16:22, 18:3, 22:9, 22:21, 25:18</p> <p>charges [3] - 11:4, 22:7, 24:7</p> <p>chase [1] - 6:17</p> <p>check [1] - 55:12</p> <p>choose [2] - 50:1, 50:3</p> <p>chosen [1] - 9:22</p> <p>Chris [1] - 48:11</p> <p>CHRISTOPHER [1] - 2:9</p> <p>circumstances [2] - 5:17, 18:19</p> <p>circumstantial [1] - 46:8</p> <p>cited [4] - 10:9,</p>	<p>31:19, 39:12, 57:7</p> <p>citizen [1] - 30:17</p> <p>civil [1] - 57:5</p> <p>claim [3] - 7:12, 22:6, 38:22</p> <p>clarify [1] - 14:17</p> <p>clarity [1] - 14:1</p> <p>clause [3] - 9:5, 9:14, 57:3</p> <p>Clause [2] - 9:5, 9:15</p> <p>clear [6] - 16:18, 17:9, 31:22, 47:7, 55:17, 56:3</p> <p>clearly [2] - 17:13, 23:15</p> <p>client [11] - 18:18, 42:22, 47:11, 50:22, 53:14, 53:17, 54:12, 55:5, 55:8, 55:10, 55:12</p> <p>clock [5] - 12:22, 13:1, 16:16, 28:3</p> <p>close [3] - 31:3, 45:22, 46:3</p> <p>closed [1] - 49:9</p> <p>closer [1] - 29:16</p> <p>closing [2] - 5:8, 57:17</p> <p>club [1] - 13:4</p> <p>co [1] - 22:22</p> <p>co-terminus [1] - 22:22</p> <p>code [1] - 32:5</p> <p>codes [1] - 44:9</p> <p>cogently [1] - 16:4</p> <p>colleague [1] - 49:10</p> <p>colleagues [1] - 49:13</p> <p>comfortable [1] - 35:21</p> <p>Commission [47] - 5:18, 7:9, 10:3, 10:5, 10:11, 15:20, 18:4, 19:1, 19:9, 20:10, 24:6, 24:9, 25:1, 28:9, 29:21, 30:20, 31:21, 32:14, 35:2, 37:22, 38:20, 38:22, 39:10, 39:13, 40:8, 40:10, 41:8, 41:17, 42:11, 42:13, 43:2, 44:13, 45:2, 46:3, 46:7, 47:21, 48:6, 48:10, 48:14, 48:16, 48:20, 49:3, 49:20, 50:4, 51:7, 54:12</p> <p>COMMISSION [2] - 1:3, 2:1</p>	<p>Commission's [10] - 6:14, 11:2, 22:21, 23:19, 23:20, 27:4, 34:12, 35:19, 41:10, 41:18</p> <p>commissioner [9] - 10:19, 23:4, 36:1, 40:2, 43:13, 49:16, 53:5, 53:10, 55:22</p> <p>Commissioner [14] - 2:4, 2:5, 2:6, 4:8, 4:9, 4:10, 4:11, 30:7, 35:6, 38:15, 49:4, 52:6, 52:22, 53:11</p> <p>COMMISSIONER [57] - 10:20, 13:7, 13:21, 14:16, 15:5, 15:16, 17:18, 18:17, 21:2, 23:2, 23:6, 24:16, 25:2, 25:7, 25:12, 25:22, 26:8, 26:16, 26:20, 27:5, 27:10, 27:22, 36:3, 37:19, 38:17, 39:4, 39:16, 40:3, 41:5, 41:12, 42:1, 42:8, 43:5, 43:10, 43:14, 46:4, 46:12, 46:17, 47:8, 48:11, 48:21, 49:17, 50:7, 51:15, 51:20, 52:8, 52:16, 53:1, 53:6, 53:11, 54:14, 54:19, 54:20, 55:4, 55:14, 55:16, 56:4</p> <p>Commissioners [9] - 5:13, 10:18, 47:2, 49:5, 52:12, 52:21, 55:20, 56:9, 56:21</p> <p>committee [4] - 19:15, 34:9, 36:20, 37:17</p> <p>Committee [8] - 21:6, 21:13, 21:17, 22:22, 28:15, 28:16, 38:6, 44:15</p> <p>Committee's [1] - 22:9</p> <p>communication [3] - 29:21, 54:21, 54:22</p> <p>company [2] - 16:8, 16:13</p> <p>complaint [1] - 17:2</p> <p>completely [3] - 22:4, 23:6, 41:8</p> <p>compliance [1] - 50:9</p> <p>concern [2] - 19:18,</p>
--	---	--	--	---

**170444-1**

22:11  
concerned [2] - 44:19, 54:9  
conciliation [11] - 40:9, 42:2, 42:17, 49:8, 50:2, 50:10, 51:22, 52:11, 52:13, 55:18, 56:1  
conciliations [1] - 40:14  
concluded [2] - 8:12, 19:2  
concludes [3] - 10:15, 44:13, 45:2  
conclusion [2] - 6:21, 22:3  
conduct [34] - 7:11, 7:20, 8:9, 10:7, 17:13, 17:14, 18:14, 18:15, 20:1, 21:9, 22:14, 22:17, 23:17, 24:2, 24:10, 24:13, 24:14, 26:6, 32:5, 32:22, 33:12, 33:20, 33:22, 35:1, 35:20, 37:15, 38:2, 39:2, 43:17, 44:10, 45:8, 45:9, 52:10  
confer [1] - 55:5  
confirm [1] - 55:8  
conflict [1] - 15:3  
conforming [1] - 35:20  
confused [1] - 23:7  
Congress [16] - 9:17, 11:17, 11:22, 12:2, 13:9, 13:10, 14:4, 14:5, 20:21, 21:12, 26:4, 30:12, 30:20, 31:15, 32:17, 44:20  
Congressional [1] - 24:1  
Congressional-sanctioned [1] - 24:1  
Congressman [7] - 7:5, 7:18, 8:4, 33:20, 37:10, 39:2, 45:15  
connection [13] - 13:12, 14:9, 14:10, 15:12, 19:6, 21:21, 23:8, 30:4, 30:6, 30:10, 30:13, 44:16  
consensus [1] - 48:9  
consent [1] - 49:4  
consider [3] - 36:13, 37:2, 45:21  
consideration [1] - 49:12  
considered [3] - 19:5, 20:1, 20:20  
consistent [2] - 40:19, 52:18  
constitute [2] - 26:10, 26:12  
Constitution [5] - 9:6, 9:14, 9:16, 9:21, 26:3  
constitutional [2] - 57:2, 57:8  
Constitutional [1] - 10:6  
Constitutionally [1] - 9:4  
contemplated [2] - 53:3, 53:4  
contention [3] - 21:18, 21:21, 57:3  
contract [2] - 28:18, 29:13  
contractor [4] - 28:13, 28:19, 28:21, 29:10  
control [1] - 16:16  
conversation [1] - 40:15  
conviction [1] - 21:8  
copied [1] - 41:6  
correct [2] - 42:7, 57:9  
correctly [1] - 13:8  
correspondence [1] - 41:2  
costs [1] - 25:20  
Counsel [12] - 2:9, 2:10, 5:14, 8:12, 8:18, 8:19, 10:9, 33:2, 33:4, 50:19, 54:17, 54:22  
counsel [11] - 21:5, 21:8, 41:16, 51:11, 52:14, 53:13, 55:5, 55:19, 57:22, 59:10, 59:13  
Counsel's [6] - 6:8, 6:12, 7:22, 21:4, 30:1, 40:21  
counsel's [2] - 42:10, 47:18  
country [1] - 13:4  
couple [2] - 28:7, 34:20  
course [5] - 9:8, 9:19, 33:22, 40:13, 55:15  
cover [3] - 25:19, 39:5, 39:7  
coverage [1] - 15:7  
covered [9] - 11:15, 12:7, 18:15, 24:22, 25:10, 27:2, 27:16, 30:14, 32:4  
covering [1] - 38:1  
Craig [8] - 6:9, 12:20, 16:22, 20:5, 21:5, 32:21, 41:13, 43:2  
Craig's [9] - 6:17, 7:1, 8:5, 9:2, 11:11, 18:19, 21:8, 24:13, 45:14  
credible [1] - 50:14  
criminal [4] - 25:18, 25:20, 45:9, 57:4  
critical [1] - 29:5  
Cunningham [5] - 24:4, 28:8, 28:11, 29:5, 31:7  
Cunningham's [1] - 29:17  
current [1] - 44:21  
cut [2] - 6:16, 40:22  
cuts [2] - 14:2, 14:19  
CYNTHIA [1] - 2:2

## D

D.C. [4] - 1:20, 3:6, 8:8, 9:10  
dangerous [1] - 16:3  
date [1] - 41:4  
daylight [2] - 10:12, 32:19  
days [4] - 48:18, 56:11, 56:12, 56:14  
deadline [1] - 48:20  
deal [1] - 55:19  
dealing [2] - 19:8, 47:19  
debate [1] - 50:6  
decided [2] - 46:9, 46:10  
decision [3] - 10:13, 28:22, 50:4  
decision-making [1] - 28:22  
declined [2] - 8:19, 22:18  
defense [1] - 25:20  
Defense [1] - 28:16  
degree [1] - 28:3  
deliberation [1] - 51:8  
delivery [1] - 16:10  
demonstrate [2] - 40:11, 40:16  
Department [5] - 19:11, 31:22, 39:11, 39:18, 44:18  
Department's [1] - 31:14  
departments [1] - 28:17  
depiction [1] - 21:16  
description [1] - 31:14  
designed [3] - 49:21, 51:5, 51:13  
detail [2] - 19:22, 37:13  
detailing [1] - 20:11  
details [5] - 19:10, 37:1, 39:10, 39:22, 42:6  
detained [5] - 9:17, 10:1, 12:2, 24:20, 27:21  
detention [1] - 24:22  
determination [3] - 12:12, 36:4, 37:18  
determine [2] - 32:18, 49:2  
determined [1] - 8:21  
detour [6] - 16:17, 26:9, 26:12, 26:17, 27:6, 27:12  
differ [2] - 38:15, 38:17  
difference [3] - 18:9, 22:2, 33:1  
different [10] - 14:15, 17:19, 21:20, 22:2, 22:5, 25:4, 27:19, 31:6, 42:15, 48:20  
differently [1] - 28:9  
difficulty [1] - 30:20  
direct [1] - 45:5  
direction [1] - 59:8  
directly [7] - 8:10, 11:3, 22:7, 23:12, 24:10, 24:15, 27:3  
Director [2] - 2:11, 5:15  
disagree [3] - 50:8, 51:16, 52:14  
discharge [1] - 44:12  
discretion [1] - 49:5  
discuss [2] - 6:2, 53:15  
discusses [1] - 33:19  
discussions [1] - 54:9  
disposing [1] - 50:12  
dispute [1] - 6:6  
disseminated [1] - 30:18  
distance [1] - 44:2  
distinction [2] - 13:1, 48:3  
distinctions [1] - 15:1  
distinctly [1] - 13:5  
distinguish [1] - 11:10  
distinguishable [9] - 7:2, 8:2, 29:2, 29:6, 33:3, 33:5, 33:7, 35:15, 36:7  
distinguishing [1] - 32:7  
district [5] - 9:18, 13:10, 13:18, 26:5, 45:18  
diverge [1] - 6:12  
divide [1] - 5:7  
divided [1] - 42:12  
divorce [8] - 11:4, 11:8, 12:9, 13:3, 14:6, 14:7, 14:12, 14:21  
doctrine [2] - 16:5, 27:2  
document [2] - 41:2, 41:5  
documents [6] - 37:7, 37:9, 39:12, 39:13, 39:14, 57:7  
DOJ [5] - 19:3, 33:11, 33:17, 34:18, 35:8  
dollars [1] - 7:7  
done [2] - 47:4, 52:19  
doubt [1] - 6:4  
down [4] - 16:2, 16:9, 16:11, 36:15  
draw [6] - 12:21, 17:17, 35:13, 44:1, 45:13, 46:18  
drawing [2] - 31:11, 44:5  
drawn [1] - 15:1  
drinking [4] - 12:3, 13:10, 13:16, 27:21  
driver [1] - 16:7  
driving [7] - 11:5, 11:8, 11:9, 13:9, 14:20, 16:9, 16:11  
drove [2] - 13:17, 27:17  
drugs [1] - 16:12

# PROBABLE CAUSE HEARING: MUR 6128

4

<p>drunk [4] - 11:8, 11:9, 14:20, 27:18 drunken [1] - 26:11 due [1] - 38:14 dues [1] - 13:4 DUI [5] - 11:14, 11:21, 13:11, 17:11, 27:19 DUIs [1] - 12:6 dunk [2] - 46:3, 46:5 during [3] - 9:19, 26:6, 33:22 duties [30] - 7:13, 13:13, 13:16, 13:20, 14:10, 14:11, 15:13, 19:6, 19:14, 19:19, 20:2, 20:6, 20:21, 21:10, 21:12, 21:22, 22:8, 23:8, 23:12, 23:18, 24:3, 28:19, 29:17, 30:13, 30:15, 36:19, 37:3, 38:11, 44:12, 44:17 DWI [1] - 25:15</p>	<p>escorts [1] - 20:16 ESQ [3] - 3:2, 3:3, 5:21 essentially [7] - 7:1, 18:11, 29:14, 32:13, 32:17, 37:15, 40:22 ethics [1] - 19:4 Ethics [6] - 21:6, 21:13, 21:17, 22:9, 22:22, 44:15 event [4] - 25:15, 27:16, 27:20, 31:1 events [2] - 9:20, 12:16 exact [1] - 42:5 exactly [4] - 35:4, 47:13, 51:1, 53:22 example [4] - 12:19, 15:8, 16:6, 30:15 executive [4] - 49:20, 50:5, 51:9, 51:10 exercised [1] - 22:16 exist [1] - 8:14 expected [2] - 22:14, 46:9 expend [1] - 7:10 expending [1] - 12:13 expenditures [1] - 6:8 expensed [1] - 12:20 expenses [28] - 6:18, 6:19, 7:19, 7:21, 8:13, 8:22, 11:3, 11:4, 11:20, 14:11, 19:2, 19:16, 24:6, 24:21, 30:3, 31:1, 32:19, 36:21, 38:1, 38:3, 39:5, 39:6, 40:12, 40:17, 44:14, 44:16, 46:7, 46:15 explains [1] - 33:4 explanation [4] - 8:3, 11:1, 14:2, 22:1 explanation/ justification [1] - 14:19 extend [1] - 15:6 extent [6] - 10:3, 32:11, 34:18, 44:22, 47:5, 48:16</p>	<p>23:22, 26:4, 31:19, 33:7, 37:16, 40:20 fact-specific [1] - 18:16 factor [2] - 32:7, 35:15 facts [19] - 6:11, 6:22, 7:3, 10:13, 15:18, 17:1, 17:8, 18:5, 18:18, 27:9, 28:4, 29:3, 29:5, 31:20, 32:20, 36:7, 38:19, 38:21, 44:7 factual [4] - 6:6, 47:5, 48:3, 56:16 fail [1] - 10:12 fair [1] - 42:22 fairly [3] - 29:5, 30:5, 56:19 fall [1] - 18:3 family [1] - 7:8 far [2] - 24:22, 53:21 favor [1] - 30:21 FEC [3] - 7:17, 45:21, 47:9 FEDERAL [1] - 1:3 federal [18] - 7:7, 7:13, 11:21, 12:15, 19:14, 19:19, 24:11, 28:12, 28:18, 29:10, 29:12, 36:19, 37:3, 38:11, 43:19, 43:21, 45:2, 45:4 federally [1] - 45:16 fee [1] - 12:19 fees [2] - 7:9, 12:13 feet [1] - 45:9 felt [1] - 46:7 few [2] - 10:22, 47:13 figure [1] - 27:12 final [2] - 19:7, 21:2 finally [1] - 10:8 financially [1] - 59:14 findings [1] - 41:19 firm [1] - 54:2 first [6] - 6:5, 21:15, 34:11, 34:12, 41:7, 43:1 five [1] - 6:3 fix [1] - 50:17 flexibility [1] - 50:21 flexible [2] - 5:10, 50:20 flight [1] - 10:2 Floor [1] - 1:19 focus [2] - 31:19, 33:9</p>	<p>follow [2] - 28:7, 47:3 follow-up [2] - 28:7, 47:3 following [1] - 5:14 foot [1] - 17:2 foregoing [1] - 59:5 formal [1] - 43:20 former [9] - 7:8, 31:16, 32:3, 32:10, 33:10, 33:15, 35:12, 37:16, 44:21 forth [4] - 20:18, 22:15, 26:6, 45:18 forthcoming [1] - 53:22 forum [3] - 43:7, 43:9, 52:10 four [2] - 48:9, 55:20 frank [1] - 40:20 frankly [1] - 8:3 free [1] - 24:7 frolic [5] - 16:17, 26:12, 26:17, 27:6, 27:11 front [3] - 34:17, 42:7, 50:6 full [1] - 34:18 fundamental [1] - 22:12 funds [5] - 14:13, 19:15, 25:20, 30:22, 36:20 furthermore [1] - 9:11</p>	<p>20:15, 34:1, 36:15 grave [1] - 45:8 gravity [1] - 45:10 Group [1] - 3:4 guess [4] - 31:6, 47:10, 49:6, 49:19 guidance [1] - 35:20 guilty [3] - 17:1, 17:7, 43:18</p>
<p><b>E</b></p>				<p><b>H</b></p>
<p>effectively [1] - 49:9 elected [2] - 14:6, 14:7 ELECTION [1] - 1:3 element [1] - 7:14 eligibility [1] - 12:13 ELLEN [1] - 2:5 emphasize [1] - 45:19 employed [2] - 59:11, 59:14 employee [2] - 43:19, 59:13 employees [4] - 33:8, 33:14, 35:12 en [1] - 25:19 enables [1] - 45:17 encourage [1] - 50:9 end [3] - 6:3, 21:10, 21:12 enforcing [1] - 42:14 engage [1] - 51:7 engaging [2] - 15:6, 52:13 entailed [1] - 24:2 entails [1] - 9:9 entitled [2] - 10:10, 35:18 envisioned [1] - 56:16</p>	<p><b>F</b></p>	<p><b>G</b></p>	<p>gained [1] - 33:16 gather [1] - 20:3 General [18] - 2:9, 2:10, 5:14, 6:8, 6:12, 7:22, 8:11, 8:18, 8:19, 10:9, 21:4, 29:22, 33:2, 33:4, 40:21, 50:18, 54:17, 54:21 generally [2] - 48:18, 55:2 gift [1] - 17:22 given [5] - 29:11, 38:16, 49:1, 55:14, 59:9 govern [1] - 10:4 governing [1] - 10:7 government [2] - 8:6, 9:3 Grand [5] - 7:6, 19:4,</p>	<p>half [2] - 34:11, 34:12 hand [1] - 28:20 handbook [1] - 22:20 handle [2] - 21:19, 29:4 happy [2] - 15:15, 43:1 hard [2] - 34:20, 35:13 head [1] - 16:7 hear [1] - 56:3 heard [1] - 23:10 hearing [12] - 5:16, 19:1, 36:6, 47:21, 48:13, 48:19, 49:20, 50:6, 51:4, 51:13, 58:1, 58:2 HEARING [1] - 1:7 heart [1] - 24:14 held [1] - 7:18 help [1] - 41:15 helpful [1] - 47:16 hereby [1] - 59:5 hereto [1] - 59:14 HERMAN [48] - 3:3, 5:21, 5:22, 11:13, 13:14, 14:14, 15:2, 15:14, 16:2, 17:20, 20:7, 22:4, 23:15, 24:19, 25:5, 25:11, 25:21, 26:2, 26:13, 26:18, 26:22, 27:8, 27:14, 28:2, 29:14, 32:9, 33:19, 34:11, 35:16, 37:7, 38:14, 38:19, 39:9, 40:1, 40:18, 41:7, 41:20, 42:5, 42:20, 45:14, 46:6, 46:14, 54:11, 56:3, 56:6, 57:6, 57:10, 57:19 Herman [3] - 4:3, 5:20, 57:16 herman [1] - 5:4</p>

17044411134

5

<p><b>highly</b> [1] - 6:3  <b>history</b> [1] - 22:17  <b>hits</b> [2] - 16:9, 16:12  <b>holder</b> [16] - 6:20, 7:13, 11:7, 13:14, 19:20, 20:6, 22:8, 23:10, 23:13, 23:18, 24:11, 24:15, 36:19, 37:3, 38:11, 45:2  <b>holder's</b> [4] - 13:12, 14:10, 15:12, 20:2  <b>home</b> [12] - 8:8, 9:7, 9:18, 11:19, 13:9, 13:18, 15:9, 25:9, 25:19, 43:22, 45:18  <b>honestly</b> [1] - 10:12  <b>hours</b> [1] - 27:18  <b>House</b> [13] - 19:3, 19:6, 28:15, 32:3, 32:6, 33:7, 33:14, 35:12, 35:13, 36:12, 38:5, 44:15, 44:17  <b>house</b> [5] - 13:3, 24:8, 28:12, 28:20, 31:8  <b>Hughey</b> [3] - 51:16, 56:11, 56:22  <b>HUGHEY</b> [8] - 2:9, 47:20, 48:5, 48:13, 49:1, 56:12, 57:1, 57:7  <b>Hunter</b> [3] - 4:8, 40:2, 46:22  <b>HUNTER</b> [17] - 2:3, 40:3, 41:5, 41:12, 42:1, 42:8, 43:5, 43:10, 47:8, 48:11, 48:21, 50:7, 51:15, 51:20, 52:16, 54:19, 55:4  <b>hypothetical</b> [4] - 13:22, 15:15, 26:19, 27:15</p> <p><b>I</b></p> <p><b>Idaho</b> [3] - 8:8, 9:8, 9:9  <b>identical</b> [2] - 7:1, 41:3  <b>identifies</b> [1] - 30:7  <b>illegal</b> [1] - 17:5  <b>immune</b> [1] - 9:17  <b>immunity</b> [1] - 9:14  <b>immunity-from-arrest</b> [1] - 9:14  <b>implications</b> [1] -</p>	<p>16:1  <b>important</b> [2] - 51:21, 52:3  <b>imposes</b> [1] - 48:20  <b>improper</b> [2] - 33:13, 38:2  <b>inappropriate</b> [4] - 17:7, 17:13, 37:15, 51:10  <b>inappropriately</b> [1] - 17:3  <b>incident</b> [1] - 11:9  <b>include</b> [2] - 26:21, 51:11  <b>included</b> [2] - 20:10, 38:21  <b>including</b> [2] - 20:9, 50:20  <b>inconsistent</b> [1] - 44:8  <b>incurred</b> [2] - 31:9, 44:16  <b>indistinguishable</b> [1] - 18:20  <b>individual</b> [2] - 45:8, 47:2  <b>influence</b> [3] - 11:5, 28:21, 29:12  <b>information</b> [23] - 33:16, 34:6, 35:14, 37:17, 44:19, 45:1, 47:3, 47:14, 47:22, 48:10, 48:15, 48:17, 48:22, 49:11, 52:4, 52:18, 53:7, 53:9, 53:12, 53:21, 54:1, 54:7, 56:8  <b>informed</b> [2] - 9:22, 32:15  <b>inhabitancy</b> [1] - 9:4  <b>initial</b> [2] - 41:9, 41:10  <b>injured</b> [1] - 25:17  <b>inoculates</b> [1] - 44:3  <b>inquiries</b> [1] - 38:2  <b>inquiry</b> [16] - 19:3, 19:4, 19:10, 19:12, 19:17, 31:14, 33:9, 34:5, 35:5, 35:7, 36:22, 38:4, 39:11, 41:10, 44:15, 44:18  <b>Intelligence</b> [1] - 28:15  <b>intent</b> [1] - 38:18  <b>interaction</b> [9] - 9:11, 9:19, 31:15, 32:1, 32:4, 33:8, 34:6, 35:10, 44:20</p>	<p><b>interactions</b> [2] - 32:1, 35:11  <b>intercepted</b> [1] - 30:16  <b>interest</b> [1] - 54:5  <b>interested</b> [5] - 34:21, 48:22, 50:21, 50:22, 59:15  <b>interests</b> [1] - 42:13  <b>Interior</b> [2] - 36:12, 38:6  <b>internal</b> [1] - 49:1  <b>interpret</b> [1] - 42:15  <b>interpreting</b> [1] - 57:9  <b>intervening</b> [2] - 28:1, 28:2  <b>introduction</b> [1] - 5:19  <b>invent</b> [1] - 27:14  <b>inventing</b> [1] - 27:3  <b>Investigation</b> [9] - 7:10, 7:19, 33:11, 33:18, 33:20, 36:17, 39:17, 39:21, 44:8  <b>investigative</b> [1] - 44:8  <b>involve</b> [1] - 19:13  <b>involved</b> [3] - 33:10, 45:3, 45:9  <b>involves</b> [2] - 36:17, 37:15  <b>involving</b> [1] - 30:16  <b>irrespective</b> [3] - 8:14, 8:21, 12:11  <b>issue</b> [8] - 6:9, 11:14, 26:7, 27:9, 27:20, 28:5, 30:21, 47:6  <b>issued</b> [1] - 39:2  <b>issues</b> [8] - 5:17, 48:1, 48:4, 48:15, 54:16, 56:9, 56:16, 56:17  <b>itinerary</b> [3] - 20:13, 20:14, 34:3  <b>itself</b> [1] - 35:17</p> <p><b>J</b></p> <p><b>jail</b> [1] - 47:9  <b>JARDIM</b> [2] - 59:4, 59:18  <b>July</b> [1] - 50:18  <b>juncture</b> [1] - 9:2  <b>jurisdiction</b> [4] - 21:13, 21:18, 22:16, 22:21</p>	<p><b>Justice</b> [4] - 19:11, 39:11, 39:18, 44:18  <b>justification</b> [3] - 8:17, 11:1, 14:2</p> <p><b>K</b></p> <p><b>keep</b> [2] - 5:11, 51:12  <b>killed</b> [1] - 25:17  <b>killing</b> [1] - 26:11  <b>kind</b> [3] - 22:17, 43:6, 50:21  <b>kinds</b> [1] - 30:12  <b>knowing</b> [1] - 50:21  <b>knows</b> [1] - 19:9  <b>Kolbe</b> [28] - 6:15, 6:22, 7:3, 7:5, 8:5, 10:4, 10:14, 15:3, 18:18, 18:21, 20:8, 23:21, 29:17, 31:13, 32:2, 32:13, 33:1, 33:2, 33:3, 33:5, 33:16, 34:5, 35:21, 36:10, 43:15, 43:16, 44:6, 44:22  <b>Kolbe's</b> [12] - 7:18, 19:2, 19:14, 19:16, 32:15, 33:20, 36:19, 36:21, 37:10, 39:2, 44:14, 45:15</p> <p><b>L</b></p> <p><b>language</b> [16] - 14:22, 15:3, 20:4, 21:3, 29:20, 34:14, 35:2, 35:5, 35:16, 35:21, 38:9, 38:13, 46:15, 47:20, 48:4, 49:3  <b>Larry</b> [2] - 21:5, 41:13  <b>law</b> [5] - 16:4, 16:7, 42:14, 50:8, 57:8  <b>Law</b> [1] - 3:4  <b>layover</b> [1] - 15:8  <b>learn</b> [1] - 54:3  <b>learned</b> [1] - 16:4  <b>learning</b> [1] - 54:4  <b>least</b> [3] - 11:19, 48:9, 49:14  <b>leave</b> [1] - 18:7  <b>leaves</b> [1] - 25:14  <b>left</b> [3] - 27:16, 27:20, 57:17  <b>legal</b> [26] - 6:13, 6:17, 7:9, 7:19, 8:22,</p>	<p>11:2, 11:3, 11:8, 11:10, 12:13, 14:1, 15:20, 19:2, 19:16, 24:6, 24:14, 24:21, 30:22, 36:21, 41:18, 42:12, 42:15, 42:19, 44:14, 46:7, 56:16  <b>letter</b> [6] - 21:4, 21:5, 21:16, 41:12, 41:13, 42:1  <b>letting</b> [1] - 28:17  <b>level</b> [1] - 17:12  <b>light</b> [1] - 36:11  <b>limit</b> [1] - 53:7  <b>limited</b> [3] - 5:17, 35:14, 44:9  <b>line</b> [6] - 12:22, 17:17, 26:15, 31:11, 46:18, 51:12  <b>line-drawing</b> [1] - 31:11  <b>lines</b> [6] -</p>
--	---	---	---	--



<p>17:16, 18:5, 18:21, 21:14, 21:19, 22:3, 23:21, 24:14, 27:9, 30:21, 33:4, 45:14, 45:15, 47:4, 49:12, 50:18, 50:20</p> <p><b>MATTER</b> [1] - 1:8</p> <p><b>matters</b> [2] - 30:16, 32:11</p> <p><b>MATTHEW</b> [1] - 2:4</p> <p><b>McDermott</b> [1] - 30:15</p> <p><b>mean</b> [4] - 23:11, 39:8, 49:4, 55:6</p> <p><b>meaning</b> [2] - 37:5, 37:6</p> <p><b>meanings</b> [1] - 31:6</p> <p><b>means</b> [4] - 27:11, 38:13, 49:3, 50:19</p> <p><b>meant</b> [1] - 38:7</p> <p><b>media</b> [2] - 16:21, 37:13</p> <p><b>Meeting</b> [1] - 1:19</p> <p><b>meeting</b> [8] - 11:17, 11:19, 13:15, 13:17, 25:13, 51:8, 51:9, 51:10</p> <p><b>member</b> [15] - 11:16, 11:22, 13:9, 14:4, 15:6, 15:8, 17:21, 19:6, 20:21, 25:13, 30:11, 32:16, 33:9, 44:17, 44:20</p> <p><b>members</b> [17] - 7:8, 9:16, 12:2, 18:7, 22:12, 22:14, 26:4, 30:13, 30:19, 31:15, 32:2, 32:6, 33:12, 34:7, 35:11, 36:6, 36:13</p> <p><b>MEMBERS</b> [1] - 2:1</p> <p><b>memory</b> [1] - 32:9</p> <p><b>men's</b> [1] - 17:3</p> <p><b>mentioned</b> [2] - 28:8, 29:8</p> <p><b>might</b> [5] - 29:19, 33:11, 33:15, 42:12, 47:20</p> <p><b>Minneapolis</b> [3] - 6:19, 9:12, 20:22</p> <p><b>minutes</b> [3] - 5:6, 6:3, 57:17</p> <p><b>mirror</b> [1] - 17:4</p> <p><b>misconstrue</b> [1] - 55:21</p> <p><b>misdemeanor</b> [3] - 6:18, 15:11, 57:4</p> <p><b>mistaken</b> [1] - 24:5</p>	<p><b>money</b> [1] - 45:17</p> <p><b>months</b> [1] - 47:13</p> <p><b>morning</b> [1] - 6:2</p> <p><b>mortgage</b> [1] - 13:3</p> <p><b>most</b> [2] - 22:15, 32:12</p> <p><b>move</b> [1] - 42:18</p> <p><b>MR</b> [54] - 5:22, 11:13, 13:14, 14:14, 15:2, 15:14, 16:2, 17:20, 20:7, 22:4, 23:15, 24:19, 25:5, 25:11, 25:21, 26:2, 26:13, 26:18, 26:22, 27:8, 27:14, 28:2, 29:14, 32:9, 33:19, 34:11, 35:16, 37:7, 38:14, 38:19, 39:9, 40:1, 40:18, 41:7, 41:20, 42:5, 42:20, 45:14, 46:6, 46:14, 47:20, 48:5, 48:13, 49:1, 54:11, 56:3, 56:6, 56:12, 57:1, 57:6, 57:7, 57:10, 57:13, 57:19</p> <p><b>MS</b> [1] - 41:16</p> <p><b>must</b> [1] - 10:5</p> <p><b>N</b></p> <p><b>N.W</b> [2] - 1:18, 3:5</p> <p><b>National</b> [1] - 20:15</p> <p><b>national</b> [1] - 37:12</p> <p><b>nature</b> [3] - 45:4, 45:20, 47:5</p> <p><b>necessarily</b> [1] - 49:15</p> <p><b>necessary</b> [11] - 6:19, 7:20, 8:13, 8:20, 18:4, 19:5, 30:3, 32:18, 44:16, 46:2, 46:15</p> <p><b>need</b> [6] - 5:9, 14:22, 15:20, 53:16, 53:19, 55:16</p> <p><b>needed</b> [1] - 46:8</p> <p><b>needs</b> [1] - 15:1</p> <p><b>negotiate</b> [2] - 53:14, 55:18</p> <p><b>negotiating</b> [2] - 53:17, 54:16</p> <p><b>negotiation</b> [2] - 55:17, 56:1</p> <p><b>negotiations</b> [4] - 50:10, 52:11, 52:14, 54:1</p>	<p><b>never</b> [1] - 22:16</p> <p><b>new</b> [1] - 41:2</p> <p><b>newspaper</b> [4] - 20:11, 37:11, 37:12, 37:21</p> <p><b>newspapers</b> [1] - 39:20</p> <p><b>newsstand</b> [1] - 15:10</p> <p><b>next</b> [3] - 46:12, 49:9, 50:3</p> <p><b>nexus</b> [6] - 28:18, 29:16, 29:20, 31:3, 31:16, 44:1</p> <p><b>nice</b> [1] - 20:15</p> <p><b>normal</b> [1] - 20:20</p> <p><b>normally</b> [1] - 30:19</p> <p><b>notes</b> [1] - 39:10</p> <p><b>nothing</b> [2] - 27:6, 42:19</p> <p><b>number</b> [2] - 20:11, 37:13</p> <p><b>numerous</b> [1] - 22:18</p> <p><b>O</b></p> <p><b>object</b> [5] - 49:10, 49:13, 53:6, 53:8, 54:8</p> <p><b>objecting</b> [1] - 56:18</p> <p><b>objection</b> [1] - 54:4</p> <p><b>obligation</b> [3] - 12:4, 24:12, 26:14</p> <p><b>obliged</b> [1] - 24:17</p> <p><b>obtain</b> [1] - 44:19</p> <p><b>obtained</b> [1] - 28:11</p> <p><b>obviously</b> [14] - 9:6, 16:8, 18:16, 19:1, 19:21, 22:10, 32:3, 35:16, 42:9, 50:10, 52:16, 53:7, 55:4, 55:7</p> <p><b>occasions</b> [1] - 22:18</p> <p><b>occurred</b> [2] - 16:19, 32:22</p> <p><b>occurs</b> [1] - 12:5</p> <p><b>OF</b> [1] - 59:1</p> <p><b>offer</b> [6] - 42:17, 47:12, 47:14, 47:15, 55:11, 56:1</p> <p><b>offered</b> [1] - 51:2</p> <p><b>Office</b> [3] - 2:10, 54:17, 54:21</p> <p><b>office</b> [26] - 6:20, 7:13, 11:7, 13:12, 13:14, 14:10, 15:12, 19:19, 19:20, 20:2, 20:6, 22:8, 23:10, 23:13, 23:18, 24:11, 24:15, 32:16, 36:11, 36:19, 37:3, 38:11, 42:10, 45:2, 47:18, 54:2</p> <p><b>office-holder</b> [16] - 6:20, 7:13, 11:7, 13:14, 19:20, 20:6, 22:8, 23:10, 23:13, 23:18, 24:11, 24:15, 36:19, 37:3, 38:11, 45:2</p> <p><b>office-holder's</b> [4] - 13:12, 14:10, 15:12, 20:2</p> <p><b>officer</b> [5] - 9:12, 9:22, 17:10, 19:14, 59:4</p> <p><b>official</b> [26] - 12:4, 13:6, 13:13, 13:16, 13:20, 15:6, 15:8, 15:13, 20:21, 21:10, 21:22, 23:8, 24:3, 28:19, 28:22, 29:17, 30:13, 30:14, 31:3, 31:20, 32:21, 34:10, 43:21, 44:10, 44:11, 44:12</p> <p><b>officially</b> [3] - 12:17, 24:20, 27:1</p> <p><b>officially-sanctioned</b> [3] - 12:17, 24:20, 27:1</p> <p><b>often</b> [2] - 35:5, 44:4</p> <p><b>once</b> [1] - 15:6</p> <p><b>one</b> [16] - 12:3, 12:7, 18:21, 19:8, 21:2, 34:1, 34:7, 37:8, 40:10, 41:6, 42:8, 43:17, 44:2, 55:21, 57:1</p> <p><b>one's</b> [1] - 23:17</p> <p><b>ongoing</b> [1] - 54:8</p> <p><b>open</b> [2] - 10:17, 18:7</p> <p><b>opening</b> [4] - 5:7, 5:8, 5:12, 10:15</p> <p><b>operative</b> [2] - 12:10, 34:14</p> <p><b>Opinion</b> [19] - 6:15, 6:22, 7:4, 7:15, 10:14, 12:10, 27:4, 31:21, 32:14, 34:15, 34:17, 34:19, 34:22, 36:8, 37:10, 37:20, 39:22, 45:21</p> <p><b>opinion</b> [9] - 19:21, 20:3, 35:17, 37:4, 38:10, 39:3, 39:4, 43:15, 43:16</p> <p><b>opinions</b> [5] - 6:14, 10:11, 15:4, 35:19, 43:17</p> <p><b>opportunity</b> [8] - 5:13, 6:1, 29:7, 40:11, 40:15, 49:21, 51:21, 52:5</p> <p><b>opposed</b> [1] - 57:5</p> <p><b>order</b> [5] - 44:19, 47:1, 47:7, 47:9, 55:18</p> <p><b>ordinary</b> [11] - 6:19, 7:20, 8:13, 8:20, 18:3, 19:5, 30:3, 32:18, 44:15, 46:2, 46:14</p> <p><b>organization</b> [1] - 22:11</p> <p><b>otherwise</b> [2] - 56:12, 59:15</p> <p><b>ought</b> [4] - 18:13, 50:5, 54:3, 54:16</p> <p><b>outcome</b> [1] - 59:15</p> <p><b>outer</b> [1] - 26:14</p> <p><b>outset</b> [3] - 5:10, 6:4, 40:19</p> <p><b>outside</b> [3] - 13:6, 17:19, 27:7</p> <p><b>oversight</b> [5] - 36:11, 36:14, 36:16, 38:5, 45:6</p> <p><b>own</b> [5] - 17:8, 27:4, 43:6, 45:13, 51:13</p>	<p><b>P</b></p> <p><b>PAGE</b> [1] - 4:2</p> <p><b>page</b> [5] - 21:3, 28:10, 34:8, 34:10, 41:13</p> <p><b>pages</b> [13] - 7:8, 31:15, 31:16, 32:2, 32:3, 32:10, 33:8, 33:14, 34:7, 37:11, 37:16, 44:21</p> <p><b>paid</b> [7] - 7:6, 8:5, 9:2, 14:12, 40:12, 40:17, 45:16</p> <p><b>PALMER</b> [2] - 2:11, 57:13</p> <p><b>Palmer</b> [1] - 57:11</p> <p><b>panel</b> [1] - 36:6</p> <p><b>papers</b> [2] - 14:7,</p>
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**PROBABLE CAUSE HEARING: MUR 6128**

<p>51:7  <b>paragraph</b> [2] - 19:7  <b>paragraphs</b> [1] - 31:19  <b>Park</b> [1] - 20:15  <b>part</b> [3] - 31:21, 34:4, 52:2  <b>particular</b> [1] - 56:18  <b>particularly</b> [3] - 6:14, 7:15, 28:8  <b>parties</b> [2] - 59:11, 59:14  <b>party</b> [2] - 12:1  <b>passed</b> [1] - 30:17  <b>passing</b> [1] - 20:21  <b>past</b> [4] - 42:18, 51:2, 52:19, 55:11  <b>pasted</b> [2] - 41:1, 41:6  <b>Pause</b> [1] - 46:20  <b>pay</b> [4] - 19:15, 24:6, 30:22, 36:20  <b>pedantic</b> [1] - 34:13  <b>people</b> [4] - 39:18, 43:20, 45:3, 45:5  <b>per</b> [3] - 18:2, 18:10, 18:11  <b>percent</b> [2] - 40:22, 50:15  <b>perfectly</b> [1] - 40:20  <b>performance</b> [3] - 21:10, 21:22, 44:11  <b>perhaps</b> [1] - 27:15  <b>Permanent</b> [1] - 28:14  <b>person</b> [1] - 44:3  <b>personal</b> [8] - 11:2, 11:6, 12:1, 13:2, 17:8, 21:9, 21:19, 36:4  <b>personnel</b> [1] - 20:16  <b>perspective</b> [3] - 49:7, 49:14, 56:15  <b>PETERSEN</b> [12] - 2:4, 10:20, 13:7, 13:21, 14:16, 15:5, 15:16, 17:18, 18:17, 21:2, 23:2, 53:6  <b>Petersen</b> [4] - 4:9, 10:19, 35:6, 53:5  <b>phone</b> [1] - 30:16  <b>phrase</b> [1] - 30:3  <b>place</b> [5] - 12:16, 44:2, 45:3, 53:16, 54:6  <b>plain</b> [1] - 6:17  <b>plea</b> [1] - 43:18  <b>pled</b> [2] - 17:1, 17:7  <b>pocket</b> [1] - 17:22</p>	<p><b>point</b> [17] - 9:1, 10:1, 10:8, 15:21, 28:4, 29:19, 31:7, 34:7, 34:17, 35:17, 36:4, 42:8, 48:5, 49:7, 49:9, 53:2, 55:2  <b>pointed</b> [3] - 12:18, 29:3, 35:6  <b>points</b> [2] - 14:1, 16:17  <b>police</b> [2] - 17:2, 17:10  <b>policy</b> [4] - 49:2, 52:19, 53:3, 56:15  <b>political</b> [2] - 22:10  <b>portion</b> [1] - 21:7  <b>posited</b> [1] - 25:13  <b>position</b> [16] - 8:1, 8:6, 8:11, 8:15, 11:22, 12:15, 14:8, 28:14, 29:12, 31:4, 31:10, 35:22, 53:13, 53:18, 53:19, 54:9  <b>possible</b> [2] - 19:12, 50:19  <b>potentially</b> [1] - 17:20  <b>pre</b> [2] - 40:9, 40:14  <b>pre-probable</b> [2] - 40:9, 40:14  <b>preliminary</b> [5] - 19:10, 19:17, 36:22, 39:10, 44:18  <b>preparation</b> [1] - 18:22  <b>prepared</b> [1] - 42:20  <b>preparing</b> [1] - 40:20  <b>PRESENT</b> [1] - 2:8  <b>present</b> [3] - 18:20, 49:22, 51:6  <b>presentation</b> [1] - 10:22  <b>presented</b> [2] - 5:17, 31:20  <b>preserve</b> [1] - 42:13  <b>pretend</b> [1] - 39:7  <b>pretty</b> [4] - 13:19, 16:13, 27:1, 53:2  <b>previous</b> [3] - 10:10, 47:12, 47:15  <b>previously</b> [1] - 26:8  <b>price</b> [1] - 24:9  <b>prima</b> [1] - 11:20  <b>principle</b> [1] - 15:21  <b>private</b> [3] - 13:2, 13:6, 30:17  <b>privilege</b> [1] - 57:3  <b>privilege-from-</b></p>	<p><b>arrest</b> [1] - 57:3  <b>probable</b> [8] - 40:9, 40:14, 47:21, 48:13, 49:8, 50:1, 50:2, 51:4  <b>PROBABLE</b> [1] - 1:7  <b>probity</b> [1] - 22:15  <b>problem</b> [1] - 58:1  <b>procedural</b> [4] - 47:6, 48:3, 49:7, 56:17  <b>procedure</b> [3] - 47:19, 56:10, 56:19  <b>procedures</b> [1] - 47:18  <b>proceed</b> [2] - 10:2, 40:9  <b>proceeding</b> [4] - 11:11, 12:9, 13:3, 14:12  <b>proceedings</b> [1] - 11:8  <b>process</b> [3] - 40:6, 41:4, 55:18  <b>professionals</b> [1] - 53:20  <b>program</b> [1] - 34:10  <b>proper</b> [1] - 8:22  <b>provide</b> [2] - 8:2, 43:3  <b>provided</b> [2] - 39:13, 50:1  <b>provides</b> [1] - 9:16  <b>provision</b> [4] - 11:15, 12:6, 30:9, 57:8  <b>provisions</b> [2] - 10:6, 12:7  <b>public</b> [6] - 19:11, 39:11, 39:13, 39:15, 39:18, 39:21  <b>publications</b> [1] - 37:12  <b>purchase</b> [1] - 17:5  <b>purely</b> [2] - 21:9, 21:19  <b>purpose</b> [1] - 51:5  <b>purposes</b> [1] - 17:16  <b>pursuant</b> [6] - 6:20, 7:21, 8:6, 8:15, 9:4, 10:9  <b>put</b> [4] - 8:17, 17:22, 35:3, 35:5  <b>puts</b> [1] - 53:13  <b>putting</b> [1] - 54:10  <b>puzzled</b> [1] - 49:19</p>	<p align="center"><b>Q</b></p> <p><b>qualifies</b> [1] - 38:9  <b>QUESTIONS</b> [1] - 4:6  <b>questions</b> [13] - 5:14, 5:15, 10:17, 11:1, 21:15, 43:12, 46:18, 47:3, 47:6, 56:20, 56:22, 57:12, 57:15  <b>quickly</b> [1] - 54:13  <b>quite</b> [2] - 8:3, 10:11  <b>quote</b> [5] - 11:3, 21:9, 21:10, 21:11, 21:12  <b>quoted</b> [2] - 21:3, 21:7  <b>quotes</b> [1] - 21:4</p> <p align="center"><b>R</b></p> <p><b>rafting</b> [3] - 7:6, 20:16, 34:1  <b>raised</b> [1] - 44:14  <b>rather</b> [3] - 11:6, 19:21, 56:16  <b>reach</b> [2] - 6:21, 49:9  <b>read</b> [6] - 28:8, 34:14, 34:19, 34:22, 48:12, 51:16  <b>reading</b> [3] - 18:8, 29:9, 37:4  <b>ready</b> [1] - 42:18  <b>realize</b> [1] - 15:17  <b>really</b> [2] - 6:16, 55:17  <b>realm</b> [1] - 13:6  <b>reason</b> [3] - 15:16, 31:17, 38:9  <b>reasons</b> [2] - 17:8, 34:2  <b>receipt</b> [1] - 12:10  <b>received</b> [2] - 31:9, 34:6  <b>recognizing</b> [1] - 46:21  <b>record</b> [4] - 6:6, 20:18, 59:8, 59:9  <b>reduced</b> [1] - 59:7  <b>reference</b> [1] - 46:16  <b>references</b> [1] - 46:6  <b>referring</b> [4] - 6:21, 39:14, 39:17, 41:6  <b>refers</b> [1] - 33:2  <b>regarding</b> [8] - 14:20, 14:21, 19:17,</p>	<p>31:14, 36:22, 44:11, 44:19, 47:15  <b>regardless</b> [2] - 20:4, 45:10  <b>regulated</b> [2] - 9:13, 9:20  <b>regulations</b> [3] - 18:9, 30:2, 44:11  <b>relate</b> [2] - 15:18, 20:1  <b>related</b> [25] - 7:12, 7:13, 8:10, 11:7, 11:21, 12:14, 13:16, 13:19, 19:4, 19:13, 20:5, 22:7, 23:9, 23:12, 24:3, 24:7, 24:10, 24:15, 31:1, 36:18, 38:2, 43:18, 43:19, 44:5, 59:10  <b>relates</b> [2] - 12:10, 21:3  <b>relating</b> [8] - 6:18, 7:10, 7:19, 8:9, 11:2, 12:13, 18:8, 47:5  <b>relationships</b> [1] - 45:4  <b>relative</b> [1] - 59:13  <b>relevant</b> [8] - 7:15, 15:17, 19:8, 21:7, 23:1, 23:19, 23:20, 47:14  <b>rely</b> [3] - 10:10, 35:19, 37:21  <b>relying</b> [1] - 35:21  <b>remained</b> [1] - 41:3  <b>remarks</b> [1] - 10:15  <b>remember</b> [2] - 16:5, 47:12  <b>rendered</b> [1] - 10:14  <b>rent</b> [1] - 24:7  <b>REPORTER</b> [1] - 59:1  <b>reporters</b> [1] - 30:18  <b>representation</b> [1] - 36:9  <b>Representative</b> [10] - 19:13, 19:16, 28:11, 28:14, 34:5, 36:10, 36:18, 36:21, 44:14, 44:22  <b>Representatives</b> [3] - 32:4, 32:6, 44:17  <b>represented</b> [1] - 36:8  <b>representing</b> [1] - 5:4  <b>represents</b> [1] - 9:8  <b>request</b> [15] - 7:9,</p>
---	--	--	--	---

# PROBABLE CAUSE HEARING: MUR 6128

8

<p>7:15, 7:17, 34:12, 43:3, 47:21, 48:7, 48:10, 48:14, 49:15, 49:19, 53:7, 53:9, 54:11, 56:18</p> <p><b>requested</b> [1] - 56:8</p> <p><b>requester</b> [1] - 35:9</p> <p><b>requests</b> [1] - 48:16</p> <p><b>required</b> [2] - 7:10, 9:7</p> <p><b>requirement</b> [1] - 50:8</p> <p><b>reread</b> [2] - 18:22, 20:8</p> <p><b>reserve</b> [1] - 6:3</p> <p><b>reside</b> [1] - 9:7</p> <p><b>resolving</b> [1] - 30:21</p> <p><b>respect</b> [6] - 31:13, 38:14, 44:6, 53:19, 55:4, 57:2</p> <p><b>respectfully</b> [1] - 50:7</p> <p><b>respond</b> [2] - 29:7, 54:12</p> <p><b>respondeat</b> [3] - 16:6, 16:10, 26:9</p> <p><b>respondent</b> [7] - 47:22, 48:14, 48:17, 48:18, 50:14, 51:6, 55:9</p> <p><b>respondent's</b> [1] - 51:11</p> <p><b>respondents</b> [5] - 5:6, 40:11, 50:6, 51:22, 56:10</p> <p><b>responding</b> [3] - 18:6, 19:3, 41:21</p> <p><b>response</b> [9] - 7:17, 26:18, 30:7, 40:21, 41:7, 41:10, 41:17, 43:4, 56:11</p> <p><b>responsibilities</b> [2] - 44:12, 45:6</p> <p><b>responsible</b> [1] - 16:15</p> <p><b>restroom</b> [4] - 12:19, 17:9, 17:11, 23:17</p> <p><b>result</b> [2] - 25:17, 25:18</p> <p><b>retroactively</b> [1] - 51:17</p> <p><b>returning</b> [4] - 11:17, 11:18, 12:1, 12:4</p> <p><b>Review</b> [1] - 5:4</p> <p><b>review</b> [2] - 21:13, 32:13</p> <p><b>REVIEW</b> [1] - 1:8</p> <p><b>rise</b> [1] - 6:11</p>	<p><b>risk</b> [1] - 47:8</p> <p><b>river</b> [2] - 20:16, 20:17</p> <p><b>river-rafting</b> [1] - 20:16</p> <p><b>road</b> [1] - 16:3</p> <p><b>role</b> [5] - 34:10, 36:11, 36:14, 36:16, 38:5</p> <p><b>Room</b> [1] - 1:19</p> <p><b>room</b> [1] - 17:3</p> <p><b>route</b> [1] - 25:19</p> <p><b>RTB</b> [2] - 40:8, 41:18</p> <p><b>rule</b> [2] - 11:2, 18:10</p> <p><b>rules</b> [3] - 22:13, 44:10, 51:13</p> <p><b>run</b> [1] - 14:5</p>	<p><b>send</b> [1] - 45:22</p> <p><b>sensationalism</b> [1] - 16:21</p> <p><b>sense</b> [1] - 15:18</p> <p><b>sentence</b> [3] - 37:4, 39:7, 46:12</p> <p><b>seriously</b> [1] - 25:17</p> <p><b>served</b> [4] - 11:18, 12:5, 14:8, 25:14</p> <p><b>serves</b> [1] - 32:9</p> <p><b>Service</b> [1] - 20:15</p> <p><b>session</b> [4] - 13:10, 49:20, 50:5, 53:17</p> <p><b>set</b> [3] - 35:14, 50:9, 51:14</p> <p><b>settle</b> [4] - 42:3, 42:9, 50:19, 54:5</p> <p><b>settlement</b> [2] - 42:6, 55:1</p> <p><b>settling</b> [1] - 50:12</p> <p><b>severed</b> [1] - 17:13</p> <p><b>SHANA</b> [1] - 2:10</p> <p><b>Shana</b> [1] - 41:20</p> <p><b>share</b> [1] - 54:11</p> <p><b>shop</b> [1] - 17:22</p> <p><b>shoplifting</b> [8] - 15:11, 17:19, 17:21, 18:1, 18:2, 25:3, 25:8, 26:10</p> <p><b>shoplifts</b> [1] - 15:10</p> <p><b>short</b> [1] - 5:19</p> <p><b>side</b> [1] - 20:17</p> <p><b>sides</b> [1] - 50:16</p> <p><b>significant</b> [1] - 30:8</p> <p><b>similar</b> [1] - 17:15</p> <p><b>simple</b> [1] - 6:17</p> <p><b>simply</b> [9] - 6:21, 8:17, 22:20, 23:1, 30:11, 31:3, 32:22, 38:21, 46:1</p> <p><b>sincerity</b> [1] - 45:10</p> <p><b>sitting</b> [1] - 52:12</p> <p><b>situation</b> [2] - 25:6, 45:3</p> <p><b>situations</b> [1] - 18:16</p> <p><b>skeletal</b> [1] - 19:21</p> <p><b>slam</b> [2] - 46:3, 46:5</p> <p><b>slam-dunk</b> [2] - 46:3, 46:5</p> <p><b>slightly</b> [1] - 31:6</p> <p><b>someone</b> [4] - 24:8, 25:16, 26:11, 28:16</p> <p><b>sorry</b> [5] - 41:8, 41:20, 41:22, 42:21, 48:11</p> <p><b>sort</b> [4] - 11:10, 40:15, 42:14, 47:19</p> <p><b>sorts</b> [1] - 36:13</p>	<p><b>sounds</b> [1] - 13:22</p> <p><b>speaking</b> [1] - 41:17</p> <p><b>specific</b> [2] - 18:16, 51:5</p> <p><b>specifically</b> [3] - 36:17, 39:9, 46:6</p> <p><b>specified</b> [1] - 56:13</p> <p><b>speculate</b> [4] - 15:14, 26:14, 27:8, 28:4</p> <p><b>speculated</b> [1] - 39:19</p> <p><b>Staff</b> [2] - 2:11, 5:15</p> <p><b>staff</b> [1] - 41:14</p> <p><b>stall</b> [1] - 17:3</p> <p><b>Stan</b> [2] - 16:17, 21:5</p> <p><b>standard</b> [4] - 8:20, 8:21, 29:2, 29:19</p> <p><b>STANLEY</b> [1] - 3:2</p> <p><b>start</b> [1] - 45:11</p> <p><b>started</b> [1] - 41:1</p> <p><b>state</b> [6] - 8:8, 9:7, 9:8, 15:9, 23:15, 25:9</p> <p><b>statement</b> [9] - 5:7, 5:8, 5:12, 14:3, 14:18, 14:20, 14:21, 57:18</p> <p><b>STATEMENT</b> [1] - 5:21</p> <p><b>States</b> [11] - 8:6, 8:7, 8:11, 8:15, 9:3, 9:6, 9:13, 9:16, 9:20, 26:3, 45:17</p> <p><b>stationed</b> [1] - 21:1</p> <p><b>status</b> [5] - 23:9, 24:11, 24:15, 28:13, 45:1</p> <p><b>statute</b> [3] - 12:8, 30:2, 50:9</p> <p><b>stemmed</b> [1] - 7:9</p> <p><b>stemming</b> [1] - 11:20</p> <p><b>stenographically</b> [1] - 59:7</p> <p><b>steps</b> [1] - 50:3</p> <p><b>STEVEN</b> [1] - 2:6</p> <p><b>sticks</b> [1] - 16:6</p> <p><b>still</b> [2] - 20:5, 55:22</p> <p><b>stood</b> [1] - 18:21</p> <p><b>stopping</b> [1] - 15:21</p> <p><b>straight</b> [1] - 6:16</p> <p><b>Street</b> [2] - 1:18, 3:5</p> <p><b>street</b> [3] - 16:9, 16:11, 25:16</p> <p><b>stress</b> [1] - 6:5</p> <p><b>strictly</b> [2] - 7:12, 30:14</p> <p><b>stuff</b> [2] - 36:18, 43:6</p> <p><b>Subcommittee</b> [1] - 36:12</p>	<p><b>submit</b> [7] - 10:5, 20:19, 30:4, 31:2, 42:7, 48:14, 48:19</p> <p><b>submitted</b> [6] - 20:12, 21:16, 34:2, 37:11, 37:21, 47:12</p> <p><b>subsequent</b> [1] - 50:4</p> <p><b>substances</b> [1] - 17:5</p> <p><b>sufficient</b> [1] - 32:17</p> <p><b>suggest</b> [2] - 48:8, 55:6</p> <p><b>suggesting</b> [1] - 31:7</p> <p><b>sunshine</b> [1] - 51:17</p> <p><b>sunshined</b> [1] - 51:9</p> <p><b>superior</b> [2] - 16:6, 16:10</p> <p><b>superior/frolic</b> [1] - 26:9</p> <p><b>supplementary</b> [2] - 47:22, 48:15</p> <p><b>supportable</b> [1] - 38:22</p> <p><b>supporting</b> [1] - 37:9</p> <p><b>sway</b> [1] - 28:17</p>
				<p><b>T</b></p> <p><b>table</b> [3] - 38:12, 52:13, 55:11</p> <p><b>tapped</b> [1] - 17:2</p> <p><b>tapping</b> [1] - 45:9</p> <p><b>tends</b> [1] - 16:19</p> <p><b>tension</b> [1] - 22:5</p> <p><b>term</b> [1] - 30:6</p> <p><b>terminology</b> [2] - 41:9, 46:14</p> <p><b>terminus</b> [1] - 22:22</p> <p><b>terms</b> [4] - 12:9, 28:19, 35:19, 51:13</p> <p><b>testify</b> [1] - 59:5</p> <p><b>testimony</b> [4] - 59:5, 59:6, 59:9, 59:12</p> <p><b>themselves</b> [1] - 22:14</p> <p><b>theory</b> [2] - 40:16, 44:3</p> <p><b>thereafter</b> [1] - 59:7</p> <p><b>therefore</b> [1] - 44:13</p> <p><b>thinking</b> [2] - 42:18, 54:18</p> <p><b>three</b> [2] - 27:18, 41:13</p> <p><b>three-page</b> [1] - 41:13</p> <p><b>thrown</b> [1] - 47:9</p>

# PROBABLE CAUSE HEARING: MUR 6128

9

<p> <b>tied</b> [1] - 35:10  <b>today</b> [1] - 40:16  <b>together</b> [1] - 35:10  <b>took</b> [3] - 7:5, 12:16, 36:10  <b>topic</b> [1] - 52:21  <b>transcript</b> [1] - 59:8  <b>transfer</b> [1] - 42:4  <b>transit</b> [1] - 25:9  <b>travel</b> [7] - 9:2, 9:9, 12:17, 15:7, 15:9, 26:5, 26:6  <b>traveling</b> [3] - 8:7, 9:18, 15:9  <b>treasurer</b> [6] - 7:18, 20:10, 20:13, 32:15, 34:2, 37:10  <b>treated</b> [1] - 11:6  <b>trip</b> [34] - 7:6, 7:11, 7:20, 8:5, 12:21, 17:15, 19:4, 20:13, 20:15, 24:1, 24:20, 27:1, 31:18, 31:20, 32:10, 32:15, 32:21, 33:15, 33:17, 33:21, 34:1, 34:3, 34:21, 35:1, 36:10, 36:15, 37:14, 38:4, 43:20, 43:21, 45:16  <b>truck</b> [2] - 16:7, 16:15  <b>trucking</b> [1] - 16:8  <b>true</b> [1] - 59:9  <b>try</b> [3] - 5:11, 16:3, 17:5  <b>trying</b> [8] - 24:17, 27:12, 28:21, 31:10, 46:18, 50:11, 50:16, 51:12  <b>turn</b> [1] - 5:19  <b>two</b> [6] - 7:8, 12:7, 18:12, 21:15, 52:3, 57:1 </p>	<p> <b>UNDER</b> [1] - 1:8  <b>underlying</b> [5] - 6:10, 15:19, 16:21, 22:7, 47:6  <b>understood</b> [2] - 31:13, 34:4  <b>undertake</b> [1] - 17:15  <b>undertaken</b> [2] - 30:19, 37:14  <b>undertook</b> [1] - 24:9  <b>United</b> [11] - 8:6, 8:7, 8:11, 8:15, 9:3, 9:6, 9:13, 9:15, 9:20, 26:3, 45:17  <b>unless</b> [3] - 5:16, 48:19, 56:12  <b>unrelated</b> [2] - 21:9, 21:11  <b>untenable</b> [1] - 53:13  <b>unusual</b> [2] - 5:16, 56:19  <b>up</b> [12] - 10:17, 15:11, 16:3, 18:17, 26:9, 26:16, 27:11, 28:7, 47:3, 49:2, 50:10, 51:14  <b>useful</b> [2] - 33:17, 49:11  <b>utilized</b> [1] - 17:6 </p>	<p> <b>WALTHER</b> [9] - 2:6, 43:14, 46:4, 46:12, 46:17, 53:11, 54:14, 54:20, 55:14  <b>Washington</b> [10] - 1:20, 3:6, 8:8, 9:9, 9:19, 10:2, 20:22, 25:9, 26:5, 32:21  <b>ways</b> [2] - 42:15, 50:17  <b>Wednesday</b> [1] - 1:12  <b>Weintraub</b> [8] - 4:10, 23:5, 30:7, 36:2, 38:15, 49:16, 52:7, 52:22  <b>WEINTRAUB</b> [23] - 2:5, 23:6, 24:16, 25:2, 25:7, 25:12, 25:22, 26:8, 26:16, 26:20, 27:5, 27:10, 27:22, 36:3, 37:19, 38:17, 39:4, 39:16, 49:17, 52:8, 53:1, 55:16, 56:4  <b>well-taken</b> [1] - 18:13  <b>wife</b> [1] - 14:4  <b>willing</b> [8] - 42:3, 42:9, 42:10, 42:16, 47:11, 55:10, 55:20, 55:22  <b>wishes</b> [1] - 37:8  <b>witness</b> [1] - 59:9  <b>witnesses</b> [2] - 3:1, 59:6  <b>WITNESSES</b> [1] - 4:2  <b>wonder</b> [1] - 32:8  <b>words</b> [3] - 31:6, 36:9, 38:8  <b>works</b> [1] - 51:18  <b>writing</b> [1] - 40:19  <b>written</b> [1] - 43:4  <b>wrote</b> [2] - 40:22, 53:3 </p>
<p><b>U</b></p>	<p><b>V</b></p>	<p><b>Y</b></p>
<p> <b>U.S</b> [2] - 21:6, 28:13  <b>U.S.C</b> [4] - 6:20, 7:21, 8:16, 10:9  <b>ultimately</b> [1] - 17:1  <b>under</b> [15] - 11:5, 12:11, 24:12, 32:16, 35:18, 36:10, 36:13, 36:15, 38:5, 39:17, 39:20, 46:2, 46:9, 46:10, 59:8  <b>Under</b> [1] - 5:4 </p>	<p> <b>vague</b> [1] - 30:6  <b>vagueness</b> [1] - 30:9  <b>various</b> [1] - 37:12  <b>versed</b> [1] - 41:9  <b>veterans</b> [2] - 12:11, 12:14  <b>Vice</b> [2] - 2:3, 46:21  <b>vice</b> [1] - 56:7  <b>view</b> [1] - 52:15  <b>views</b> [1] - 52:21  <b>violations</b> [1] - 44:9  <b>voluntary</b> [1] - 50:9  <b>vote</b> [3] - 43:6, 50:1, 50:2  <b>voted</b> [2] - 40:8, 50:18 </p>	<p> <b>year</b> [2] - 22:16, 40:8  <b>years</b> [1] - 52:3  <b>yesterday</b> [1] - 20:9  <b>yourself</b> [1] - 18:14 </p>
	<p><b>W</b></p>	
	<p> <b>wade</b> [2] - 28:12, 29:10  <b>walks</b> [1] - 25:15  <b>Walther</b> [3] - 4:11, 43:13, 53:10 </p>	

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